

Jur. rel.
1736

Decisions

FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

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also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
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local works on Pleading and Practice.*

VOL. XI.

COURTS — CREDITORS' BILL.

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

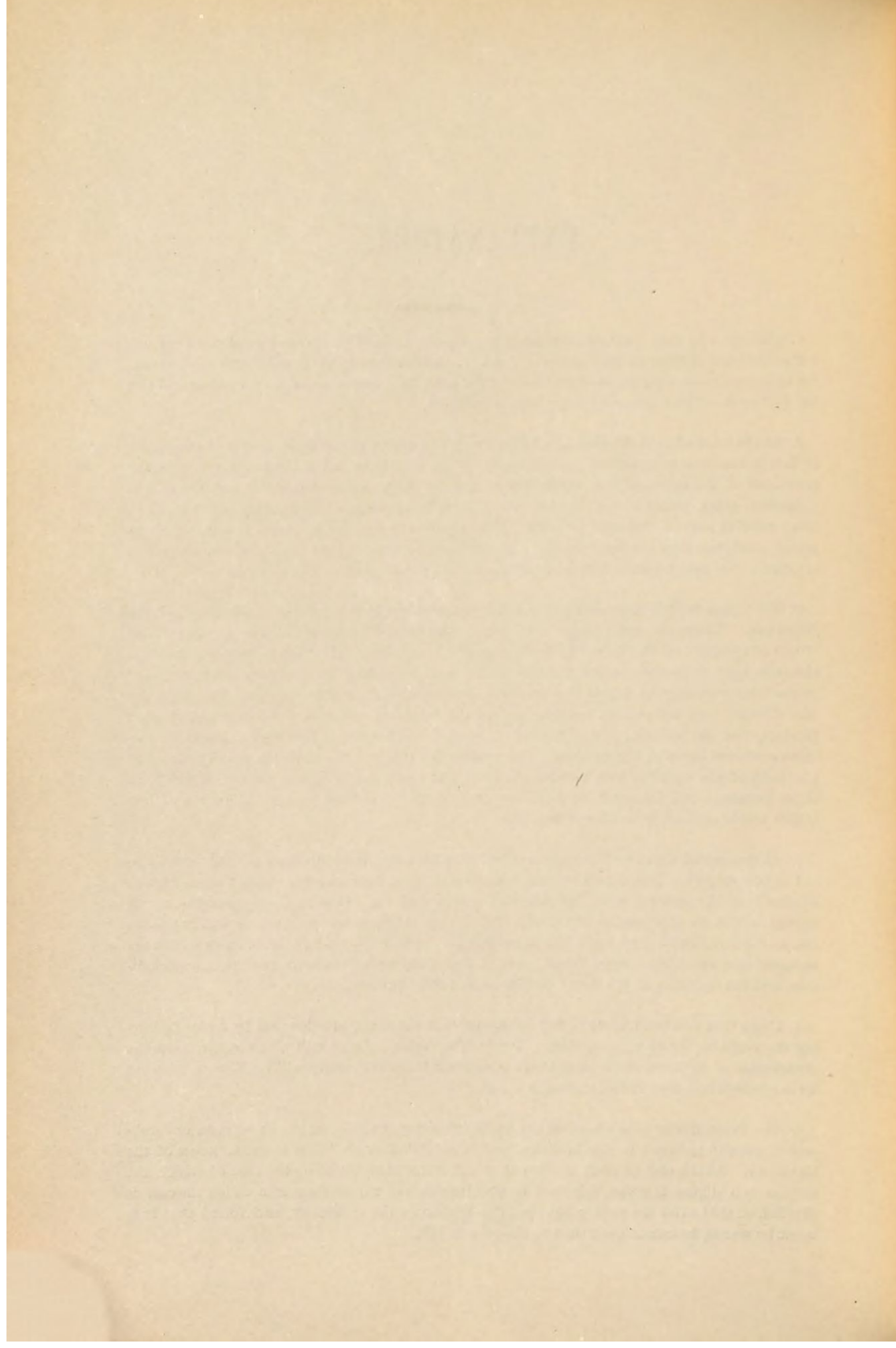
2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, DOE *v.* ROE.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.



NOTE.

This volume having been edited by BENJAMIN R. CURTIS, ESQ., one of the special editors selected for this work, the usual certificate of approval is omitted.

MR. FRANK A. FARNHAM, of the Suffolk Bar, has greatly assisted me in the selection and preparation of the cases, and in the general editing of this volume.

BENJAMIN R. CURTIS.

BOSTON, *November, 1885.*

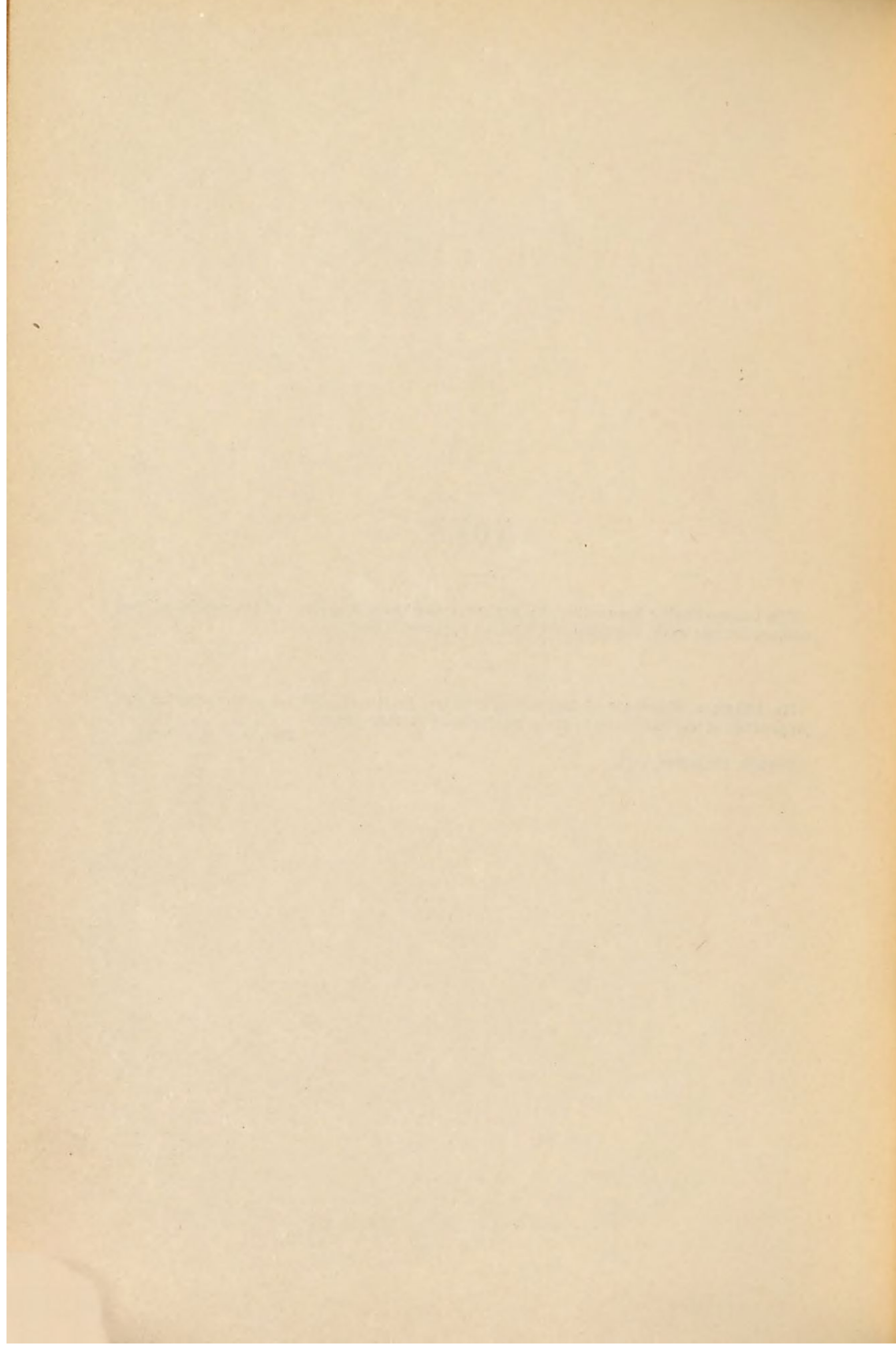


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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister	McAl.
Albany Law Journal	Alb. L. J.	McCahon	McCahon.
American Law Register ...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
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Call	Call (Va.).	Oregon	Oreg.
Central Law Journal	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
Chicago Legal News	Ch. Leg. N.	Paine	Paine.
Clifford	Cliff.	Peters	Pet.
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Crabbe	Crabbe.	Sawyer	Saw.
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Curtis	Curt.	Story	Story.
Dakota Territory	Dak. T'y.	Sumner	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court ...	Wall. C. C.
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Hoffman	Hoff.	Woods	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter ..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

COURTS.*

[Appellate jurisdiction of the Supreme Court, see APPEALS AND WRITS OF ERROR. Jurisdiction in Criminal Cases, see CRIMES, XXII. See, also, CONSTITUTION AND LAWS, XI; JUDGMENTS; PRACTICE; WRITS. As to Courts of Equity, see EQUITY.]

- I. JUDGES, §§ 1-42.
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- III. JURISDICTION OF UNITED STATES COURTS, §§ 167-719.
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 - 1. *Territorial Courts*, §§ 1976-2010.
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- XII. LEX FORI AND REMEDIES, §§ 2332-2358.

*Edited by BENJAMIN R. CURTIS, Esq., of Boston, Massachusetts.

I. JUDGES.

SUMMARY — *Formerly of counsel*, § 1. — *Former interest in subject-matter*, § 2. — *Where case is to be tried when circuit judge is disqualified*, § 3. — *Effect of act of 1869 on previous legislation*, § 4. — *Decision of former judge in same court*, § 5.

§ 1. At common law it was no ground of challenge that the judge had been of counsel, and the United States statutes apply only when the former cause and controversy were identical with the present. *The Richmond*, §§ 6-8.

§ 2. A judge is not disqualified from sitting in the case of a bankrupt's estate by the fact that at the time of failure he was a creditor of the bankrupt, but has sold his claim. *In re Sime*, §§ 9-11.

§ 3. When the judges of a circuit court are disqualified from sitting by reason of interest in the case, the act of 1839 requires that the case be certified to the circuit court nearest in point of distance, provided that be competent. *Richardson v. Boston*, § 12.

§ 4. The act of congress of 1869, providing for the appointment of circuit judges, and prescribing their powers and duties, did not repeal the special legislation existing on the subject and providing for exigencies. *In re Nicolas*, § 13.

§ 5. A justice of the supreme court while sitting alone in the circuit court will not entertain a motion previously decided by another judge of the same court. *Appleton v. Smith*, § 14.

[NOTES.— See §§ 15-42.]

THE RICHMOND.

(Circuit Court for Louisiana: 9 Federal Reporter, 863-865. 1881.)

§ 6. *At common law there could be no challenge on the ground that the judge had been of counsel.*

Opinion by BILLINGS, D. J.

A motion has been made that I should decline to sit in this cause because I have been of counsel. The doctrine of recusation of judges is of continental origin. According to the law of Great Britain it has been unknown since before Blackstone's time. According to the law which prevails upon the continent, and as declared in the Code of France, a judge is recusable if he has given counsel, pleaded, or written of the controversy, has previously acted as judge or arbitrator, or defrayed the expenses of the suit, deposed as a witness, etc. But at the common law as it prevailed in England, and was adopted by the people of the United States, there could be no challenge or recusation of judges on the ground that the judge had been of counsel. See *Coke, Litt.*, 294; 2 *Bro. Civ. & Adm. Law*, 369; 3 *Bl. Com.*, 361; *Lyon v. State Bank*, 1 *Stewart*, 442.

§ 7. — *provisions of the United States statutes.*

This leaves nothing to be considered except the United States statutes. Of these there are two. The first, which is found in the Revised Statutes, sec. 601, applies only to causes pending in the district courts. The last, found in the Revised Statutes, sec. 615, authorizes and requires the court, on the application of either party, to transfer a cause to another circuit court. There could be no pretext that the first statute applied. It would dispose of the second statute to say that this is not an application to transfer to another court. In *Spencer v. Lapsley*, 20 *How.*, 266, it is settled that the inability was to be disclosed on the record, upon motion of one of the parties, and that a judge interested might make the order of removal. It is clear that, except upon motion to remove, the machinery provided by the statute could not be set in operation, even in a cause included in its scope.

§ 8. — *the controversy must have been identical with the present.*

But does this cause fall within this statute, even had this application been a motion to remove? The ground suggested is that the judge has been of counsel. The language of the statute is, has "been of counsel for either party." In this case the judge had been one of the parties in a suit in law for damages by collision. In that suit an appeal bond had been given, and the pending proceeding is to fix the liability of the sureties on the appeal bond. It would seem that the controversy or cause here, though growing or issuing out of the cause in which there was a judgment, is distinct. It presents a different question, and is against a party not an actor in the other suit. In *The Bank of North America v. Fitzsimmons*, 2 Bin., 454, it was held that it was no objection to a judge, that while at the bar he had been consulted and had given an opinion in favor of one of the parties. In *Blackburn v. Craufurd*, 22 Md., 447, it is held: The fact that a judge had been counsel in a case theretofore tried between two of the parties to the bill, which involved some of the issues raised in the bill, did not bring him within the letter or spirit of the constitutional inhibition against sitting in a case wherein he may have been of counsel. To the same effect see, also, *Taylor v. Williams*, 26 Tex., 583. In *Cook v. Berth*, 102 Mass., 372, a magistrate was held not to be disqualified by a statute similar in terms, and to have properly sat in an action of ejectment, though he had drawn the plaintiff's lease, under and upon which the action was brought, and had written the notice to quit. In *Thellusson v. Rendlesham*, 7 H. of L. Cas., 429, where a court constituted of so many members could, with slight inconvenience, dispense with the participation in a hearing of one of the peers, Lord St. Leonard stated that he had on two occasions been of counsel in the cause, though not upon a point then pending, but that he "did not conceive that these facts absolved him from the duty of taking part in the hearing." The lord chancellor (Lord Chelmsford) and Lord Brougham concurred in that view, and no member of the house dissented.

The decisions, so far as I have been able to find, are unanimous that "of counsel" means "of counsel for a party in that cause and in that controversy," and if either the cause or controversy is not identical the disqualification does not exist. In the case before me, the controversy in which the judge was of counsel was as to the liability for a collision. The controversy now pending and being litigated is with reference to the liability of sureties under a mandate remitted from the supreme court. It could not be error for the judge to sit in this matter, nor would the statute exempt him. The rule is, therefore, as a matter of right, dismissed. But the consent of the opposed party having been given, an order, based upon consent of parties, will be entered, that the matters now at issue in this cause be restored to their place on the calendar, to be heard by that member of the court who may preside when the same may be moved on for trial.

IN RE SIME.

(Circuit Court for California: 2 Sawyer, 320-325. 1872.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—Objection is made to the jurisdiction of the circuit judge on the ground of disqualification. At the time of the failure of the banking house of John Sime & Co., I was a depositor, having a balance to my credit on the books of the bank of \$625.03. My claim has since been purchased and

paid for by another creditor, and duly assigned to him. I took no part in the proceeding other than formal, such as making the proof of my claim in the prescribed mode, and assenting without examination to one or two steps in the proceedings, at the request of other creditors. The party objecting is the attorney of the assignee in bankruptcy of one King, who sets up a large claim against the bankrupts' estate for the conversion of certain stock, and which is contested by the trustees, and is in course of litigation in a suit pending in the state courts. The same party was the first to invoke my action while still a creditor, and when my interest was known to him, by presenting his petition to me for a revision of the action of the district court, and asking the necessary orders for the trustees to answer the same, and for staying the payment of any dividend until the rights of his client could be determined on said petition in this court. No action was taken by me until after the assignment of my claim, and then the first order made was on the application mentioned of the same party. Having invoked my action to bring the case before this court, and after thus getting it here, having raised and argued, without objection, a point of practice of a character tending to delay the proceeding, which was overruled by me, he now, for the first time, objects to my further action on the ground of legal disqualification, well knowing that if the point can be sustained, all further proceedings will be suspended till the return of Mr. Justice Field.

§ 9. *A judge who was a creditor of the bankrupt, but has parted with his claim, is not disqualified by his former interest.*

After a careful consideration of the subject, I am satisfied that I am no longer disqualified under the law from sitting. No statutory disqualification is brought to my notice, and the point must be determined by the principles of the common law. I have now no interest whatever in the proceeding, pecuniary or otherwise. While a creditor of the estate, I took no part other than the mere formal one mentioned. I never examined or formed any opinion concerning any question involved in the proceeding, and I am not now conscious of any bias in any manner connected with it. I was once a creditor, it is true, but I have sold and assigned my claim and received the consideration. Doubtless the motive of the purchaser in buying was to relieve me from disqualification, and prevent the proceeding from being utterly obstructed for an indefinite period of time by appeals to the supervising jurisdiction of the circuit court, and for want of a judge competent to act.

This is, certainly, not an improper motive on the part of the purchaser; and, as to myself, I could have no interest beyond getting my money. It is well known that Mr. Justice Field has just held a term in each district of his circuit, and is not required by law, and does not intend, to come to the circuit again for a period of two years. I am not aware that there is any legal objection to removing the disqualification of a judge, or any impropriety in doing it in a lawful manner. No authority is cited against it, and I have been unable to find any. On the contrary, the case of *Bank of North America v. Fitzsimmons*, 2 Bin., 454, clearly implies the propriety of such a course. When witnesses were incompetent, on the ground of interest, it was a matter of every day experience to remove the disqualification in open court, by releasing the witness from any liability, or by the witness himself releasing or receiving satisfaction for any claim that might render him incompetent. I do not perceive that there is any greater objection to removing in a legal manner the disqualification of a judge. I am, therefore, satisfied that I am now in no sense legally disqualified to act in this case.

It only remains to consider the question of delicacy, which is a matter of especial interest to myself alone. Although wholly unconscious of any bias that could in any possible degree warp my judgment upon any question that may arise, yet, as I was once a creditor, and as I have sold my claim to another creditor, whose motive in buying could only have been to remove any disqualification on my part, in case the jurisdiction of the circuit court should be invoked, and for the purpose of preventing a delay in the proceedings, I should gladly decline to act, if I could persuade myself that I could do so without a gross violation of official duty. If there was another judge competent to act, who could sit in the case without any unreasonable delay, I should not hesitate to leave the case to him. But there is practically none. As before stated, Mr. Justice Field is not expected to be here for two years, and there is no other who can act. And when he does come he can only remain for a few days, and dispose of such questions as shall then have arisen. Others would be continually liable to arise, rendering other delays necessary, till he should come again two years afterward, and these delays are liable to be repeated till the proceedings would become practically interminable. This would be equivalent to a total denial of justice. The estate in question amounts to several hundred thousand dollars, and numerous parties are interested in its speedy settlement. The parties interested are, at least, entitled to have an early adjudication of their rights. They may or may not be entitled to a dividend upon their claims before the termination of the objector's suit. However that may be, they are certainly entitled to have the appropriate tribunals determine whether they are so entitled or not, or what their rights are; and for a judge to refuse to hear their case simply on a point of delicacy, because he happens to find himself in an embarrassing position, though not legally disqualified, and when there is practically no other judge who can sit, would, in my judgment, be a gross injustice.

§ 10. *Apparent disqualifications may sometimes give way to prevent a failure of justice.*

Chancellors Kent and Walworth both sat in cases when they were disqualified by the express terms of the statute. *Matter of Leefe*, 2 Barb. Ch., 39; *People v. Edmonds*, 15 Barb., 529. In the latter case, Judge Strong decided the case, although interested in the question, but not in the case. An interest in the questions to be litigated does not appear to have been regarded as disqualifying the judge, provided he is not interested in the case. In *Stuart v. Mechanics' Bank*, Chancellor Kent was a stockholder in the bank. In *Mooers v. White*, 6 Johns. Ch., 360, he was also disqualified. Chancellor Kent sat in these cases after consulting Chief Justice Spencer, and with his approval. This action was put on the ground that there was no other judge who could sit, and there would otherwise be a failure of justice. *Pearce v. Atwood*, 13 Mass., 340; *Commonwealth v. Ryan*, 5 Mass., 90; and *Hill v. Wells*, 6 Pick., 109; and other cases, recognize the propriety of the course in such cases.

The judges of the state district courts in San Francisco have, during the past twenty odd years, tried numerous cases in which the city was a party, involving in the aggregate millions of dollars, and in which the judges, as tax payers and property holders, were necessarily interested. So, also, have the supreme court judges, although citizens of San Francisco, finally adjudicated such cases on appeal, and many others in which the state was a party, and in which they must necessarily have been interested as citizens, liable through taxation to respond. But in this case it is not necessary to go so far, as I am no longer in

any manner interested either in the case or any of the questions involved, or otherwise legally disqualified. I must decline to act, if at all, on a mere matter of delicacy, because, under the circumstances, I find it unpleasant to do so. The bankrupt act manifestly gives the circuit court supervisory jurisdiction over all matters during the course of the proceedings, embracing every interlocutory order, in order that the rights of parties may be summarily adjudicated. A refusal to act by the only judge whose action can be invoked for a period of two years, when another judge will be present for a short time only, would utterly thwart the wise policy of the law.

§ 11. *A judge is not to be influenced by personal preference in determining his own qualification.*

After mature consideration, I am fully satisfied that I am not legally disqualified to act in the case; and further, that being qualified, I am not at liberty, upon a matter of mere personal feeling or preference, to decline the responsibility thrown upon me by my official position; nor, in my judgment, would I have been justified, under the circumstances, in declining to permit the disqualification to be removed, by refusing to sell my claim for the purpose of avoiding that responsibility. Notwithstanding the fact that my own mind had reached the conclusions announced, I was still unwilling to trust wholly to my own judgment in a matter of some delicacy. I have therefore consulted two of the United States district judges of this circuit and all of the present justices of the supreme court of the state upon the point, and I am permitted to say that, without exception, they fully concur in the view that I am not disqualified, and being qualified, that I cannot decline to act under the circumstances without a gross and inexcusable violation of my official obligation. If I had entertained a doubt upon the point, I should still feel constrained to yield to the unbiased and disinterested judgment of jurists so eminently qualified to advise in a matter of the kind, especially as their judgment is in favor of my assuming jurisdiction in a matter wherein (if I could do so consistently with my own convictions of duty) I would gladly avoid action. The objection to the jurisdiction on the ground of disqualification of the judge is overruled.

RICHARDSON v. BOSTON.

(Circuit Court for Massachusetts: 1 Curtis, 250-253. 1852.)

STATEMENT OF FACTS.—Both judges of this court being disqualified by interest from sitting in this case, defendant moves that it be certified to the circuit court for New York, and plaintiff, a citizen of Rhode Island, suggests that it be certified to Rhode Island. The act of congress in question is that of 1839.

§ 12. *When the judges of a circuit court are disqualified from sitting by reason of interest, the case should be certified, under the act of 1839, to the nearest circuit court which is competent.*

Opinion by CURTIS, J.

The act of congress requires the judges, though interested, to make an order designating the particular circuit court to which the action shall be removed. The duty is one of considerable delicacy, and the statute should, if possible, be so construed as to grant to judges thus circumstanced no more discretion than is necessary to prevent a failure of justice. In the same spirit, and for similar reasons, I conceive that such judges, in exercising whatever power has been necessarily confided to them, should endeavor to lay hold of some rule fit to be

applied to all cases, and not attempt to decide on the circumstances of the particular case, their relation to which may prevent them from rightly appreciating.

There are two governing elements contained in the statute. The first is, "the most convenient circuit court;" the second, "in the next adjacent state or circuit." It is not difficult to perceive why the alternative was given allowing a removal to a circuit court in the next adjacent circuit, instead of confining it to the next adjacent state. In admiralty appeals or writs of error from the district court, if the judge of the supreme court be interested, it would not be in accordance with our system, and scarcely decorous in itself, to remove the cause to another district in the same circuit, to be heard by another district judge; and it is possible that a circuit court might not be found in the next adjacent state, for since Kentucky was admitted into the Union there have been at all times, I think, states in which there has been no circuit court, as there is none now in Wisconsin, Iowa, Florida, Texas or California. In passing a general law to cover this whole subject, it might be proper for congress to make the power broad enough to include all cases, but it may not be fit to use this broad power except in the particular classes of cases which gave occasion to it.

The leading idea of the law is, I think, proximity of place; and that circuit court which is competent to act, and nearest to the subject of the controversy, the witnesses, the parties and the court whence the removal is to take place, is the most convenient circuit court within the meaning of this act. I am not willing to enter into the nature of the particular case, or to consider the supposed superior fitness of one of these tribunals over another. It would be a difficult and not slightly invidious task to balance the advantages, real or imaginary, which the parties may conceive are to be gained or lost by resorting to one tribunal rather than another, when the law deems both equally competent. Least of all shall I attempt to do this in a case in which the law disqualifies me to sit as a judge. In my opinion, it is in conformity with the statute, and the rule should be, where the parties do not agree, that cases thus removed should go, as a matter of course, to the nearest circuit court in this circuit, unless that court is not competent, in point of law, to try them. With this view, I am of opinion this suit should be certified to the circuit court within and for the district of Rhode Island.

IN RE NICOLAS.

(Circuit Court for New York: 8 Blatchford, 102-107. 1870.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—The petitioner, having been tried and convicted of an offense against the laws of the United States and remanded for sentence, and being now held in jail under such remand, applies for a writ of *habeas corpus*, upon the allegation of illegality in such order remanding him, in this, that the circuit court at which he was tried, in this present term, was held by the Honorable Charles L. Benedict, the judge of the district court of the United States for the eastern district of New York. By section 1 of the act of July 29, 1850 (9 U. S. Stat. at Large, 442), in case of the sickness or other disability of any district judge, the circuit judge was authorized, if, in his judgment the public interests required, to designate and appoint the district judge of any other district within the circuit, to hold the district court or circuit court, in case of the sickness or absence of the circuit judge, and discharge all the duties of the district judge while such sickness or disability should continue. By the

act of April 2, 1852 (10 U. S. Stat. at Large, 5), the authority conferred by the aforesaid act was extended to any case and occasion where it should be made to appear to the circuit judge that the public interests, from the accumulation or urgency of judicial business in any district, required it to be done; and, in such case, it was made lawful for each of the said district judges separately to hold a district or circuit court at the same time, and discharge all the judicial duties of a district judge therein.

By the act of February 25, 1865 (13 U. S. Stat. at Large, 438), the eastern district of New York was created; and, by the third section, it was provided that in case of the inability on account of sickness of the district judge for the southern district to hold any court therein, it should be the duty of the judge of the eastern district to hold such court and do and perform all the acts and duties of the judge of the southern district; and that whenever from pressure of public business or other cause, it should be deemed desirable by the judge of the southern district that the judge of the eastern district perform the duties of a judge in the southern district, an order to that effect might be entered, and thereupon the judge of the eastern district should be empowered to do and perform within the southern district, and in the district court thereof, all the acts and duties of the district judge thereof. Another act may also be referred to, that the state of the law on this general subject may be exhibited. By the act of August 6, 1861 (12 U. S. Stat. at Large, 318), it was provided that in case of a vacancy in the office of district judge of any district, in a state in which there are two judicial districts, it shall be lawful for the district judge of the other district in said state to hold the district court or circuit court in case of sickness or absence of the circuit judge, and discharge all the judicial duties of the district judge so long as such vacancy shall continue.

All of these acts were passed with intent to provide for exigencies liable frequently to occur, and in which the disposal of the business in the circuit as well as the district court is hindered or prevented, or, by reason of the accumulation thereof, requires extraordinary judicial force. In pursuance of the two acts first named, Mr. Justice Nelson designated the Honorable Charles L. Benedict to hold the circuit court for the southern district of New York, in as full and ample a manner as is authorized by the said acts; and an order of the district court for the southern district was made, in pursuance of the act of February 25, 1865, requiring the said Charles L. Benedict, judge of the eastern district, to perform the duties of judge in the southern district. Under and by virtue of these acts and the designations aforesaid, the district judge, though appointed for the eastern district, becomes, *pro hac vice*, judge of the southern district; and under this authority Judge Benedict has performed the duties of district judge in the district and circuit courts for the southern district from time to time, when his duties in the eastern district would permit. During the early part of the present October term of the circuit court, Mr. Justice Nelson was ill and absent. For a portion of the time the circuit judge was ill, and, during the first two weeks, was not in attendance. During those two weeks the petitioner was tried, Judge Benedict holding the circuit court.

§ 13. *The act of 1869 did not repeal the special legislation providing for exigencies.*

The single suggestion in support of the present application is, that the act of congress (Act of April 10, 1869; 16 U. S. Stat. at Large, 44) providing for the appointment of circuit judges, and prescribing their powers and duties, has repealed or abrogated the former laws on the subject, so far as to take away

the power of the judge of the eastern district to hold the circuit court in the southern district of New York. The provision cited from the act of 1869 is, that "the circuit courts in each circuit shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district, sitting alone, or by the justice of the supreme court and circuit judge, sitting together, in which case the justice of the supreme court shall preside, or, in the absence of either of them, by the other (who shall preside), and the district judge." If the suggestion urged be true, then that act has, more clearly, had a sweeping effect through all the other districts throughout the United States, where the provisions of the act creating the eastern district have no operation; and, in none of the exigencies contemplated by the statutes referred to, can a district judge hold a circuit court without the district for which he was appointed, notwithstanding vacancies, or sickness, or absence of either or all of the judges of the circuit.

I do not think such was the intention of the law, nor its effect. Its just construction, in view of the previous legislation, and of the object of the enactment of the new statute, does not require such a result. The purpose was to provide for the appointment of circuit judges, and to define their powers and jurisdiction, not to repeal the special legislation which had provided for exigencies, and had secured the continuous, regular administration of justice. In respect to such exigencies the act of 1869 is wholly silent. True, the new appointments would render those exigencies less frequent; but they would be liable to occur, and the public interests would demand the continued remedy as truly as before. These special acts were to prevent great evils, and are not to be deemed repealed, unless the new statute very clearly requires such a construction. I think it does not, for two reasons: (1) The section which provides that the circuit court shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district, etc., was intended to introduce the new circuit judge into his proper relation and position in the circuit, and to define the relation of the other judges to him, in connection with their joint and several relation to the circuit courts of the several districts; and the import of the word "shall," in that view, is not other or more imperative than "may" would be, had that word been used. (2) The district judge of the district, there named, indicates the officer who is clothed with the authority, and may exercise the jurisdiction and powers, and is charged with the duties, of district judge in the district, whether derived from his original appointment, or from special acts of congress then existing, and the proper order or designation which devolves on him that jurisdiction and power, and those duties. For all the purposes contemplated in the act of 1869, Judge Benedict is the district judge of the southern district, within its intent and meaning, though his appointment was made, in name, for the eastern district.

Looking at the evils guarded against by the previous legislation, the nature of the exigencies provided for, the necessity of such provision, now as heretofore, the purpose of the act of 1869, and the consequences of the construction suggested, I conclude that the power and jurisdiction of Judge Benedict to hold the circuit court and try and remand the prisoner, as he did, are not impaired by the act of 1869. The application must be denied.

APPLETON v. SMITH.

(Circuit Court for Arkansas: 1 Dillon, 202, 203. 1870.)

Motion to vacate and dissolve an attachment.

Opinion by MILLER, J.

This motion is made upon the ground that the writ was wrongfully issued. Upon looking into the record of the case, I find that the same motion, based upon the same legal proposition, was made at the last term of the court, and was overruled by the district judge, who at that time held the court.

§ 14. *Where a motion has been overruled by a judge of the circuit court, there can be no appeal to the supreme justice afterwards holding court therein.* See §§ 17-21.

I have repeatedly decided in this circuit, since I was first assigned to it, that I would not sit in review of the judgments and orders of the court, made by the district judges in my absence. Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the supreme court to hear and determine such appeals, I have in this court no such prerogative. The district judge would have the same right to review my judgments and orders here as I would have in regard to his. It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other.

I have also held, and have prescribed it for myself as a rule of conduct, that the presence of the district judge, and his consent to a review of his decision, will not vary the course to be pursued. If it were understood that in such case the order of the court would be reconsidered, the desire of the district judge to have the responsibility shared by another, and his natural reluctance to refuse his assent to a rehearing, would always enable pertinacious counsel to get his consent. For these reasons I decline to consider this motion. (Motion withdrawn.)

§ 15. **District judges.**—The effect of the act of congress of April 10, 1869, was to provide for the appointment of judges specially to hold the circuit courts, but not to recast the courts nor to repeal existing legislation. Hence the power of the judges of the two district courts of Missouri to sit in the circuit court of that state is not taken away by the act. *In re Circuit Court for Districts of Missouri*,* 1 Dill., 1.

§ 16. A district judge may hold the circuit court alone, in the absence of the justice of the supreme court, or of the circuit judge. *In re Kaine*,* 10 N. Y. Leg. Obs., 263.

§ 17. A district judge, holding a circuit court alone, in the absence of his associate, the justice of the supreme court, would be acting wrongly if he should in any case review or set aside the action of that superior; so held on a motion to set aside an injunction previously granted by the supreme court judge. *Hussey v. Whiteley*, 1 Bond, 407; 2 Fish. Pat. Cas., 124.

§ 18. Although upon appeals from the district court the district judge has no vote in the circuit court, he has in all other respects the powers of a member of the court, and may consequently allow appeals from its decisions. *Rodd v. Heartt*, 17 Wall., 354.

§ 19. Rulings of the district judge while holding circuit court are not subject to be reviewed in the same court, either by the circuit judge or circuit justice. *United States v. Biebusch*, 1 McC., 43.

§ 20. Under the bankrupt act, the district judge cannot sit in the circuit court with the supreme court justice when questions are adjourned from the district court sitting in bankruptcy to the circuit court. Therefore, a question sent up to the supreme court on a certificate of division of opinion between the district judge and the supreme court justice sitting in the circuit court, is not properly before the supreme court. *Nelson v. Carland*, 1 How., 265.

§ 21. When a circuit court judge has granted an injunction, and subsequently a motion is made to dissolve the injunction, and, to support this motion, the same reasons and facts are advanced as were put forward originally to oppose the granting of the injunction, the district judge before whom such motion is made will consider himself bound by the decision of the circuit judge. *Hussey v. Whiteley*, 1 Bond, 412.

§ 22. **Circuit judges.**— A United States circuit judge may grant leave to renew a motion which has previously been denied by another judge. *Robinson v. Satterlee*, 3 Saw., 140.

§ 23. Act of congress (R. S. U. S., § 571) giving to certain district courts the powers of circuit courts does not thereby make them circuit courts, or authorize the judge of the circuit to sit in them. *Kerrison v. Stewart*, 1 Hughes, 69.

§ 24. Under the original judiciary acts, justices of the supreme court might sit as circuit judges without special commissions therefor. *Stuart v. Laird*,* 1 Cr., 299.

§ 25. **Divided court.**— On a rule to show cause why a new trial should not be granted in the federal circuit court, if the judges are divided, the motion fails; nor is this a division of opinion which can be certified to the supreme court. *Lanning v. London*, 4 Wash., 333.

§ 26. If, in the supreme court of the District of Columbia, the four judges are equally divided on a question, either party may have a rehearing. *Washington & Georgetown R. Co. v. Board of Public Works*,* 1 MacArth., 119.

§ 27. Although, on each of the principal objections relied on as showing error in the proceedings of the district court, a majority of the members of the supreme court think there is no error, yet the judgment of the district court must be reversed, if on the question of reversal the minorities unite and constitute a majority of the court. *Smith v. United States*, 5 Pet., 303.

§ 28. The court of claims has power to grant a new trial in favor of the United States, under the second section of the act of June 25, 1868, notwithstanding an appeal has been taken to the supreme court and the former judgment affirmed, and the mandate of affirmance filed in the former court. When a court, like the court of claims, is composed of five judges, and four of them hear a motion, and in conference are divided in opinion, but the majority do not order any judgment to be announced in open court based upon such equal division, and none is so announced, and afterwards a majority of the whole court remand the motion to the law docket for argument, the fact that two of the judges who heard the motion, at the time of such remanding, file their decision dismissing the motion on its merits, does not decide the question involved, nor take away the jurisdiction of the court to hear and decide the motion upon reargument. In such a case peremptory *mandamus* will issue, commanding the court to hear and decide the motion. *Ex parte United States*, 16 Wall., 699.

§ 29. **Disqualified.**— When a case comes before a court in which the judge is personally interested, he violates decorum, morality and law by remaining on the seat of justice and giving an opinion in the case. *Cooper v. Galbraith*, 3 Wash., 557.

§ 30. A judge who has a deposit in a bankrupt banking concern may assign his claim to another creditor and is not then disqualified to sit as judge in the case. *In re Sime*, 7 N. B. R., 407.

§ 31. A magistrate to whom an insolvent debtor has made a voluntary deed of trust of all his property is interested, and therefore not competent to sit as a magistrate, in the discharge of the debtor under the insolvent law of Virginia. *Slacum v. Simms*, 5 Cr., 367.

§ 32. The federal circuit court in the District of Columbia reversed a judgment of the mayor of Washington for the reason, among others, that he was a party in the case. *Barney v. Washington City*, 1 Cr. C. C., 248.

§ 33. A federal judge, interested in a suit which comes before him for trial, may order it removed to the most convenient adjacent circuit court. *Spencer v. Lapsley*, 20 How., 266.

§ 34. The act of 1839, section 8 (5 U. S. Stat., p. 322), providing that, when one judge of the circuit court is interested in a cause, he may have it tried in another circuit, is not repealed by act of March 3, 1863 (12 U. S. Stat., p. 768), which relates to the same general subject. *Supervisors v. Rogers*, 7 Wall., 175.

§ 35. A cause in the circuit court may be transferred from one circuit court to another, when it shall appear that either judge either has been of counsel or is interested in the case. *Ibid.*

§ 36. **Personal liability.**— A judge of a court of general jurisdiction who, upon certain acts of gross malpractice being brought to his notice, removes the lawyer guilty of them from his standing as an attorney at law, is not liable for such act in absence of proof that he exceeded his jurisdiction and acted with malice. Judges are not civilly liable for their official acts. *Randall v. Brigham*, 7 Wall., 535 (ATTORNEYS, 38-41).

§ 37. A judge of a court of superior jurisdiction is not liable to a civil action for any judicial act done within his jurisdiction, nor when such acts are in excess of his jurisdiction, unless done maliciously or corruptly. The admission and removal of attorneys are judicial acts. *Ibid.*; *Bradley v. Fisher*, 13 Wall., 336 (ATTORNEYS, §§ 56-64).

§ 38. **Privilege.**— A service of summons upon a judge of a state court upon a writ from a United States court was held to be good if made while the judge was not actually in court or on his way there or back. The question was, however, certified to the supreme court. *Lyell v. Goodwin*, 4 McL., 45.

§ 39. A judge of a state court is privileged from summons or arrest on a writ issuing from a United States court while in actual attendance in his court or going there or returning. *Ibid.*

§ 40. **An order of a judge** committing an accused person for trial is illegal and void unless the accused has had an opportunity to confront the witnesses or has heard their testimony read, or been informed of the substance of it. A verbal direction from a judge to bring an accused party before him, issued on the mere statement of one witness without oath or affirmation, is no authority for his arrest. *Johnson v. Tompkins*, Bald., 571, 572.

§ 41. **The appointment of a judge by a military governor** of a state, while the state is in occupation by the troops, is purely military, authorized only by the necessities of military occupation, and subject to revocation whenever, in the judgment of the military governor, revocation should become necessary or expedient. And a military governor who succeeds the one making the appointment may exercise the power of revocation. The office also becomes vacant when the civil constitution of the state is again in full operation independent of military control, and the vacancy may be enforced by removal of the former incumbent, and by a new appointment by the civil governor. *Handlin v. Wickliffe*, 12 Wall., 173.

§ 42. **A territorial judge**, holding office for four years, does not wield any part of the judicial power of the United States, conferred by the constitution on the government. *American Ins. Co. v. Canter*,* 1 Pet., 511.

II. ORGANIZATION AND SUMMARY JURISDICTION. JURISDICTION GENERALLY. TERMS. RULES. OFFICERS. RECORDS. CONTROL OVER PROCEEDINGS.

SUMMARY — *Judicial functions*, §§ 43, 44.— *Power over judgment rendered at a former term*, § 45.— *Power to adjourn a session*, § 46.— *Right to examine records*, § 47.— *Acts of clerk de facto*, § 48.— *Acts of clerk on non-judicial day*, § 49.

§ 43. It is a proper exercise of a judicial function for the court, in accordance with an act of congress, to settle the terms on which a bridge over a river may be used by a railroad company. *In re Canada Northern Railway*, §§ 50-52. See XI, *infra*.

§ 44. It is no less the exercise of judicial functions to prescribe a rule of conduct, or protect the existence of a right during a future period, than it is to determine whether the right has been invaded in the past. *Ibid.* See § 75.

§ 45. After final judgment a court has no power to set aside verdict and judgment at a subsequent term, for a supposed want of jurisdiction or for error in law, though it may correct errors in form. *Bank of United States v. Moss*, §§ 53-59. See § 80.

§ 46. The power of adjourning a session is common to all courts, and the statutory provision authorizing the courts of the District of Columbia so to do merely affirmed a pre-existing power. *Mechanics' Bank v. Withers*, § 60.

§ 47. A citizen of the United States has not a right to examine at any time he may please, during office hours, all the books and records of a court of record. *In re McLean*, §§ 61-63. See § 113.

§ 48. The acts of a clerk *de facto* are valid so far as regards third persons. *Cocke v. Halsey*, §§ 64-67. See § 105.

§ 49. There is nothing at common law nor in the statutes of Wisconsin to prohibit the doing of a ministerial act on a non-judicial day, and the act of the circuit clerk in docketing a judgment on Christmas day is not void. *In re Worthington*, §§ 68, 69.

[NOTES.— See §§ 70-166.]

IN RE CANADA NORTHERN RAILWAY v. INTERNATIONAL BRIDGE COMPANY.

(District Court, Northern District of New York: 7 Federal Reporter, 653-657. 1880.)

STATEMENT OF FACTS.— Plaintiff in this case applied to the court to settle the terms under which it should enjoy the easement of a bridge across the Niagara river, under the control of the defendant. By act of congress of June 30, 1870, the duty of settling those terms was imposed upon the district court.

Opinion by WALLACE, J.

After fully considering the preliminary questions presented on the argument, I am of opinion that it was competent for congress to impose such conditions as in its discretion might seem proper concerning the use and control of the International bridge, and that by the act in question ample jurisdiction was conferred upon this court to determine the present controversy. While it was competent for the legislature of New York and the Canadian parliament to charter corporations and grant franchises for the construction and maintenance of the bridge, so far as their respective sovereignties were concerned, the corporation could only obtain the full benefits of the grant by the consent of congress. The subject of the grant was the right to build and control a bridge which would be a highway of transportation not only between the United States and a foreign country, but also the eastern and western states. It was therefore of the first importance to ascertain whether congress would sanction the purposes of the grant, and the terms and conditions upon which such sanction could be obtained. It was for congress to determine when its power to regulate commerce should be brought into activity, and as to the regulations and sanctions which should be provided. *Gilman v. Philadelphia*, 3 Wall., 725 (CONSTR., §§ 1164-70); *The Clinton Bridge*, 10 Wall., 454; *Pennsylvania v. The Wheeling Bridge Co.*, 18 How., 421.

§ 50. *The power conferred upon the district court by act of congress of June 30, 1870, to settle terms for the use of a bridge over Niagara river is a judicial function.*

By the act in question congress gave its sanction in advance, but upon the conditions that all railway companies desiring to use the bridge should have equal rights and privileges in the passage and in the use of the bridge, and of the machinery, fixtures and approaches, "under and upon such terms and conditions" as this court should prescribe, "upon hearing the proofs and allegations of the parties in case they should not agree." The power of congress over the subject was plenary. It exercised the power, and the International Bridge Company availed itself of the privileges and assented to the conditions of the legislative sanction. Congress could not delegate its legislative power to any other authority, nor could it confer jurisdiction upon this court to exercise any but judicial functions; and if the act in question, in any of its provisions, contravenes these maxims of constitutional law as to those provisions, it is inoperative. But the act is not obnoxious to these objections. It devolves upon this court simply the judicial functions of determining the rights of parties when they may be brought into controversy. The rights are created and established by the act; and this is the office of the legislative department. The power to adjudicate upon these rights, to ascertain, when controversy arises, their extent and value, and apply the appropriate remedy for their protection, is conferred upon the court; and this is the peculiar province of the judicial department.

§ 51. *What is a judicial function as distinguished from an exercise of legislative power.*

It is argued that the act attempts to confer upon the court the power to fix the rate of tolls which the International Bridge Company may charge, and that this is a legislative and not a judicial function. If congress had fixed the rate of tolls, as it had the right to prescribe the conditions upon which the franchise might be enjoyed, no other authority could have intervened to change these conditions. But suppose the act had, in terms, provided that the bridge company might charge reasonable tolls, would not this have been a complete

exercise of the legislative power, and would it not have remained for the judicial department to decide, when controversy should arise, what were or were not reasonable tolls? And if the act had provided for such a determination by a judicial tribunal, would this have been unconstitutional? It seems to me clearly not. It is no less the exercise of judicial functions to prescribe a rule of conduct or protect the existence of a right during a future period, than it is to determine whether the right has been invaded in the past. It is one of the common offices of a court of equity to do this.

It is said that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. It seems to me that this statement of the distinction is incomplete. It is essential to judicial action that there be parties and a controversy. Judgment is only pronounced after a hearing. That would not be judicial action which should determine the existing law in relation to some existing thing, already done or happened, without the intervention of parties and the existence of a controversy; and when there are parties and a controversy it is not less a judicial act because the determination regulates rights and obligations in the future, and the manner in which they shall be observed. The act of congress in effect provides that all the companies using the bridge shall have equal privileges in its use, and for a reasonable compensation, to be ascertained by the court if the parties cannot agree. The phraseology employed is unfortunate, and fairly suggests the objections which have been urged; but when the act refers the question of the conditions upon which an easement shall be enjoyed to a judicial tribunal for decision, after hearing the proofs and allegations of the parties, the implication is cogent that this decision shall proceed upon settled principles of law and equity, and not upon arbitrary discretion.

§ 52. *Courts will uphold an act of congress whenever they can consistently do so.*

An act of congress will not be declared unconstitutional unless every reasonable doubt to the contrary is resolved against its validity; and it is the duty of courts so to construe the act as to uphold it, if possibly consistent with the language used. Had it been the intent of the act to confer jurisdiction upon the court simply to enforce equality, and prevent unfair discrimination for or against any of the several corporations in the use of the bridge, it would have been unnecessary to authorize the court to prescribe the "terms and conditions" upon which the various companies might use the bridge. It would have sufficed to confer jurisdiction in general terms over any controversy that might arise, and it would then have been competent for the court to enforce equality upon any of the principles and by any of the remedies known to the court. Effect must be given to the language used. The conclusion reached is also in harmony with considerations of a more general character. It can hardly be supposed that congress intended to grant unlimited authority to a corporation to fix any compensation it might see fit for the use of the bridge, because it would then be in the power of the corporation to do indirectly what it has not intended should be done. The bridge company could charge such tolls that no railway company could use the bridge unless it should be a stockholder, and thereby receive in dividends what it might pay out for tolls. The bridge was to be an enterprise of great public importance, and it is reasonable to suppose that congress intended carefully to guard the public interests which were concerned.

BANK OF UNITED STATES v. MOSS.

(6 Howard, 31-40. 1847.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.—In this case, at the November term of the circuit court for the southern district of Mississippi, A. D. 1841, a verdict was found for the plaintiffs against the defendants for \$26,485.66. Final judgment was then rendered for that sum. At the ensuing May term, on motion of the defendants, the court set aside both the judgment and verdict, and dismissed the case for what is considered to be a want of jurisdiction. To this the plaintiff excepted, and a writ of error is now before us to reverse that decision. The first question is whether any want of jurisdiction appears on the record. No evidence is reported nor any defect apparent which seems to raise any doubt concerning the jurisdiction, unless it be in the pleadings. The declaration contained the usual money counts, beside special ones on two notes made to Briggs, Lacoste & Co., or their order, and by them indorsed to the plaintiffs. The defendants pleaded that they did not promise as alleged, and a verdict was found against them, without any statement being given of the evidence laid before the jury or the court, though copies of the two notes named in the declaration are printed in the case.

§ 53. *A special count by indorser against maker should aver maker and payee to be residents of different states.*

The various questions which this state of the record presents, and which bear upon the jurisdiction, can, when analyzed and separately considered, be disposed of chiefly by adjudged cases without any labored examination of the principles involved. The special counts on the notes standing alone might not be sufficient under the eleventh section of the judiciary act (1 Stats. at Large, 78) to give jurisdiction to a circuit court of the United States, without an allegation that the promisees resided in a different state from the promisors. *Turner v. Bank of North America*, 4 Dall., 8 (§ 1098, *infra*), and 9 Wheat., 539; *Dromgoole v. Farmers' & Merchants' Bank*, 2 How., 243, and *Keary v. Farmers' & Merchants' Bank of Memphis*, 16 Pet., 95.

§ 54. *A money count will give jurisdiction on the record without averring the citizenship of maker and payee.*

But it is very clear that the money counts aver enough to give jurisdiction to the court below over them, as they state an indebtedness and a promise to pay, made directly by the defendants to the plaintiffs. *Mollan v. Torrance*, 9 Wheat., 539; *Bingham v. Cabbot*, 3 Dall., 41. It is well settled likewise that the notes would at the trial be evidence of money had even of an indorsee. 4 Es. Ca., 201; 7 Halst., 141; 6 Greenl., 220; 12 Johns., 90; 8 Cowen, 83; *Wild v. Fisher*, 4 Pick., 421; *Webster v. Randall*, 19 id., 13; *Ramsdell v. Soule*, 12 id., 126; *Ellsworth v. Brewer*, 11 id., 316; 16 id., 395; *State Bank v. Hurd*, 12 Mass., 172; 15 id., 69, 433; *Page's Administrators v. Bank of Alexandria*, 7 Wheat., 35; 2 Wm. Bl., 1269.

But they probably would not alone be sufficient by the eleventh section of the judiciary act, to give jurisdiction over them to a circuit court of the United States, under these money counts any more than the others, without additional evidence that the original promisees resided in a different state from the promisors. 7 Wheat., 35, *semb.* No decision, however, is made on this point, as from this record we cannot learn but that such additional evidence

was given, or that other evidence than the notes was not introduced in support of the money counts.

§ 55. *Where there was no objection to the jurisdiction, and the record is sufficient, the inference is that the jurisdictional facts were proved on the trial.*

It is not competent for this court now to presume that neither of these kinds of evidence was offered beside the notes. The inference, on the contrary, is the other way, or the defendants would probably have objected to the jurisdiction at the trial, and the jury not found a verdict for the plaintiffs, or the court not have rendered judgment upon it. In the next place, if such a state of things did happen as there having been no additional or other evidence, it is clear from the record that no advantage was taken of it till after final judgment and at the following term of the court, and then by motion only.

§ 56. *After final judgment, and at the next term, it is too late to set aside verdict and judgment on motion, on the ground of a supposed want of jurisdiction.*

But it was then too late after final judgment and at the next term, and by motion only, to set aside the judgment and verdict on account of a supposed want of jurisdiction. At the next term, if no final judgment had yet been rendered, the court might, from its minutes, have had the verdict applied to the counts on which it was in truth found. 2 How., 263; 2 Saund., 171, *b*; Tidd's Pr., 901. And if in this case it was found on the two special counts alone, the judgment on the verdict might then have been arrested for want of proper averments in them conferring jurisdiction. So it might have been arrested for a misjoinder of bad counts with good, if the verdict had not been applied to the latter, but remained general. Hopkins v. Beedle, 1 Caines, 347; 5 Johns., 476; 1 Chit. Pl., 236, 448; 1 Taunt., 212; 2 Bos. & Pul., 424; Cowp., 276; 3 Wils., 185; 2 Saund., 171, *b*; 3 Maul. & Selw., 110; Doug., 722. But here jurisdiction did not appear on three of the counts, and also final judgment had been rendered in November previous.

The action was not regularly on the docket at the new term in May following, when the court undertook to set the judgment aside. The power of the court over the original action itself, or its merits, under the proceedings then existing, had been exhausted, ended. Jackson v. Ashton, 10 Pet., 480; Catlin v. Robinson, 2 Watts, 379; 12 Pet., 492; 3 Bac. Abr., Error, T., 6; Co. Lit., 260*a*; 7 Ves., 293; 12 Ves., 456; 1 Stor. P., 310; 1 Hoff. Pr., 559; 2 Smith, Ch., 14; 9 Pet., 771; 3 Johns., 140; 9 id., 78; Kelly v. Keizer, 3 Marsh., 268. This means the power to decide on it, or to change opinions once given, or to make new decisions and alterations on material points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court at a previous term, is never a sufficient justification for revising and annulling it, at a subsequent term, in this summary way, on motion. See cases *ante*; 2 Gall., 386; Cameron v. McRoberts, 3 Wheat., 591; 2 Haywood, 237; Skinner v. Moore, 2 Dev. & Bat., 138; Wash. Bridge Co. v. Stewart, 3 How., 413; and Jackson v. Ashton, 10 Pet., 480; Lessee of Hickey v. Stewart, 3 How., 762; Henderson v. Poindexter, 12 Wheat., 543; Elliott v. Peirsol, 1 Pet., 340; Wilcox v. Jackson, 13 Pet., 511; Rose v. Himely, 4 Cranch, 241.

§ 57. — *but mere forms of judgments, clerical errors, etc., may be corrected at a subsequent term.*

We would not be understood by this to deprive a court, at a subsequent term, of power to set right mere forms in its judgments. 3 Wheat., 591; 3 Pet., 431; 12 Wheat., 10; Lawrence v. Cornell, 4 Johns. Ch., 542. Or power to correct misprisions of its clerks. The Palmyra, 12 Wheat., 10; Hammer v.

McConnel, 2 Ohio, 32; 1 Greenl., 375; Com. Dig., Amendment, T., 1. The right to correct any mere clerical errors, so as to conform the record to the truth, always remains. *Sibbald v. United States*, 12 Pet., 492; *Medford v. Dorsey*, 2 Wash., 433; 6 Watts, 513; 8 id., 424; 1 Wendell, 101; 4 id., 217; 1 Bibb, 324; 2 id., 88; *Weston's Case*, 11 Mass., 417; *Bank v. Wistar*, 3 Pet., 431. Irregularities, also, in notices, mandates, and similar proceedings can still, in some cases, be amended. *Ex parte Crenshaw*, 15 Pet., 123. Indeed, any amendments permissible under the statutes of jeofails, may be proper at subsequent terms (2 Tidd's Pr., 917; 2 Arch., Pr., 202, 243); and at times even after a writ of error is brought. 2 How., 243; 3 Johns., 95; Poph., 102; *Pease v. Morgan*, 7 Johns., 468; *Creetham v. Tillotson*, 4 Johns., 499; 1 Johns. Cas., 29; 2 Johns., 184; 1 Bing., 486; *Douglass v. Bearn's Executors*, 5 Binn., 60. So it is well settled that, at a subsequent term, when the judgment had before been arrested, an amendment may be made to apply the verdict to a good count if another be bad and the judge's minutes show that the evidence applied to the good count. *Matheson v. Grant*, 2 How., 282, and cases cited there. So a mistaken entry of a mandate, in a case where the parties were not at all before the court, may be revoked at a subsequent term, the hearing having been irregular and a nullity. *Ex parte Crenshaw*, 15 Pet., 119; 14 id., 147. But no cause of this kind appears here in the proceedings, and nothing else appears to justify the court in going back to a final judgment of a previous term, and summarily setting it aside for an error in the law or the facts, and dismissing the whole case from the docket.

§ 58. — *mode of relief for errors in law.*

The only relief for errors in law, in such cases, is usually by new trial, review, writ of error, or appeal, as either may be appropriate and allowable by law, or by some other mode specially provided by statute; where, for instance, a judgment has occurred at some previous term by default, through accident or some circumstance which clearly entitles the party to redress. 12 Pet., 492; *Jenkins v. Eldredge*, 1 Woodb. & M., 65, and cases cited; *Anthony v. Love*, 3 Ohio, 306; *Bennett v. Winter*, 2 Johns. Ch., 205; 3 Marsh., 268; *Southgate v. Burnham*, 1 Greenl., 375. Besides these remedies, judgments entered up by fraud may, perhaps, on due notice, by *scire facias*, or otherwise, be vacated at a subsequent term by the same court, or if offered in evidence be deemed a nullity, should fraud be clearly proved to have taken place. 2 Roll. Abr., 724; 2 Bac. Abr., Error, T., 6.

§ 59. *Where the pleadings do not show jurisdiction in the federal courts, their judgments are voidable on writ of error, but not void.*

But the present judgment was neither fraudulent nor void on its face, nor even voidable. Had it been rendered on the special counts alone, it might have been voidable by a writ of error, for not alleging jurisdiction in the pleadings. See *ante*; 2 How., 243; *Capron v. Van Noorden*, 2 Cranch, 126. But it has been repeatedly settled, that even then, without any plea to the jurisdiction, and after a verdict for the plaintiff on the general issue and final judgment, it is not a nullity, but must be enforced till duly reversed. *Kempe v. Kennedy*, 5 Cranch, 185 (§§ 508, 509, *infra*); and *Skillern v. May*, 6 Cranch, 267; *McCormick v. Sullivan*, 10 Wheat., 192; *Voorhees v. Bank of United States*, 10 Pet., 449; 3 Ohio, 306; *Wilde v. Commonwealth*, 2 Met., 408; *Hopkins v. Commonwealth*, 3 Met., 460. Because it would be a judgment rendered by a court, not of inferior but only limited jurisdiction, and the merits would have been investigated and decided by consent. This view is supported by the En-

lish doctrine. There, though judgments of inferior courts or commissioners are often void, when on their face clearly without their jurisdiction, and may be proved to be so and avoided without a writ of error (3 Bac. Abr., Error, A; 10 Cok., 77*a*; Hawk. P. C., ch. 50, sec. 3), yet the judgment of a superior court is not void, but only voidable by plea on error. Bac. Abr., Void and Voidable, C; 2 Salk., 674; Carth., 276. Even where the record of a circuit court did not contain any averments giving jurisdiction, this court has held that, at a subsequent term, after final judgment, the same tribunal which rendered it could not set it aside on motion. *Cameron v. McRoberts*, 3 Wheat., 591. And we have repeatedly decided as to judgments of this court, that they could not be changed at a subsequent term, in matters of law, whether attempted on motion, or a new writ of error, or appeal, on the mandate to the court below. 5 Cranch, 316; 6 *id.*, 267; 1 Wheat., 354; *The Santa Maria*, 10 Wheat., 442; *Davis v. Packard*, 8 Pet., 323; 9 Pet., 290; 12 Pet., 343, 491; 15 Pet., 84.

Without going further, then, into the reasons or precedents against the course pursued in the court below, the last judgment there, on the motion, must be reversed, and the case be reinstated as it stood before.

MECHANICS' BANK OF ALEXANDRIA *v.* WITHERS.

(6 Wheaton, 106-109. 1821.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment rendered by the circuit court for the District of Columbia, sitting in Alexandria, in an action of debt; and the case depends on the laws of Virginia, as they stood when jurisdiction over the District was first exercised by congress.

By the law of Virginia, the proceedings, until an issue is made up in a cause, are taken in the clerk's office, at monthly rules, and judgments by default become final on the last day of the succeeding term, till which day the defendant in any such action has a legal right to set the judgment aside, and to plead to issue. The circuit court held its regular session in April, 1818, and continued to sit regularly till the 16th day of May, when it adjourned to the fourth Monday of the following June. The clerk, considering the day on which the court adjourned as the last day of the term, and the judgments at the rules as having, on that day, become final, issued an execution on one of these judgments, which had been obtained by the plaintiffs, against Cave Withers and his common bail. When the court met in June, the defendant appeared, and on motion was allowed to set aside the office judgment, give special bail, and plead to issue. The execution was consequently quashed. In the course of the term, judgment was confessed by the defendant for the sum claimed in the declaration, and a writ of error was then sued out, the object of which was to reverse the last judgment, and set aside all proceedings subsequent to the 16th of May, on the idea that the judgment rendered at the rules became final on that day. The sole question in the cause is whether the adjournment from the 16th of May to the fourth Monday in June was a continuation of the April term, or constituted a distinct term.

§ 60. *All courts have the power of adjourning a term to a distant day, and this power is not taken away from the circuit court of the District of Columbia by 2 Stats. at Large, 194.*

There being nothing in any act of congress which prevents the courts of the District from exercising a power common to all courts, that of adjourning to a

distant day, the adjournment on the 16th of May to the fourth Monday in June would be a continuance of the same term, unless a special act of congress (2 Stats. at Large, 194), expressly enabling the courts of the District to hold adjourned sessions, may be supposed to vary the law of the case. That act is in these words: "And the said courts are hereby invested with the same power of holding adjourned sessions that is exercised by the courts of Maryland." These words do not, in themselves, purport to vary the character of the session. They do not make the adjourned session a distinct session. They were probably inserted from abundant caution, and are to be ascribed to an apprehension that courts did not possess the power to adjourn to a distant day until they should be enabled so to do by a legislative act. But this act, affirming a pre-existing power, ought not to be construed to vary the nature of that power, unless words are employed which manifest such intention. In this act there are no such words, unless they are found in the reference to the courts of Maryland. But on inquiry, we find that, in Maryland, an "adjourned session" is considered as the same session with that at which the adjournment was made. Since, then, the term at which this conditional or office judgment was to become final was still continuing when it was set aside, and the defendant permitted to plead to the declaration, there was no error in that proceeding.

Judgment affirmed.

IN RE McLEAN.

(Circuit Court for Ohio: 2 Flippin, 512-518. 1879.)

Opinion by SWING, J.

STATEMENT OF FACTS.—This is a petition filed by Mr. J. R. McLean and the Enquirer Company, in which they set out that heretofore, to wit, on the 7th day of November, 1879, application was made to Thomas Ambrose, clerk of this court, by J. H. Woodward, an agent of said Enquirer Company, for leave to inspect, during office hours, books containing the docket and minute entries, judgments and decrees of the said district court and the United States circuit court, and that the said clerk then and there refused the said J. H. Woodward the privilege to so inspect or examine the books aforesaid. Your applicants would, therefore, respectfully ask the court to order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said court, be open to the inspection of the said J. H. Woodward, agent of the said Enquirer Company and of said John R. McLean, under such regulations as to the court may seem proper. With this application there is filed the affidavit of one James H. Woodward, in which he says that he is employed by the Cincinnati Enquirer Company, a corporation doing business under the laws of the state of Ohio, and that acting under the orders of John R. McLean, the manager of said corporation, he made personal application to Thomas Ambrose, clerk of the United States circuit and district courts, for permission to examine the public record, fee books and decrees of said court, and permission was refused him by the said Thomas Ambrose, clerk as aforesaid; and said application was renewed on this day and date by him, as a citizen having the right to inspect said books, decrees and minutes, and was again refused. To this application there is filed by the clerk a demurrer on the ground that the petition does not contain facts sufficient to entitle the applicants to the order they pray for.

This proceeding, in one sense at least, is adversary in its character, and yet it is based upon the alleged refusal by an officer of this court of permission to exercise an alleged right of the petitioner. The right which they allege was refused was that of having one J. H. Woodward to inspect, during office hours, books containing the docket and minute entries, judgments and decrees of the district court and the United States circuit court. This right is based solely upon the ground that John R. McLean is a citizen of the United States and that the Enquirer Company is located in the United States. It is not claimed for either that they have any interest in the docket or minute entries, judgments and decrees recorded in said books. If the prayer of the petitioners prayed simply for the right which they claimed an officer of this court has deprived them of, there would be no difficulty in determining the case. But such is not the fact. They pray for an order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said courts, be open for the inspection of one J. H. Woodward. It will be seen at a glance that their prayer is greatly beyond what they allege they were not permitted to examine. That was the books containing the docket or minute entries of the judgments and decrees, but this is not only that the judgments and decrees may be examined, but that all other books containing the public records and orders of the court shall be opened to their inspection. So much for the allegations of the petition itself.

§ 61. *A citizen of the United States has not, as such, a general right to examine all the books and papers of a court of record.*

But let us see how the allegation of the right, which they allege they were deprived of, is supported by the affidavit which has been filed. The petition says that the application was for leave to inspect the books containing the docket and minute entries, judgments and decrees. The affidavit of the man Woodward is that he applied for permission to examine the public records, fee books and decrees, showing clearly and conclusively that the petition is not supported by the affidavit. Such is this application, as shown from the papers filed. But it is claimed that notwithstanding the variance between the allegations of the petition and the prayer, and the variance between the proof and allegations, petitioners are entitled in law to the order prayed for; that they are so entitled by the statutes of the United States, or if not by them, they are by the common law entitled to it; that all the books and papers of a court of record are subject to the examination and inspection of any citizen, whether he have any personal interest in them or not; that it is his high and indefeasible right, at any time he pleases during office hours, to make such inspection. If this is true, it is very clear that the petitioners are entitled to the order prayed for. The doctrine is a new and strange one, and certainly finds no support in any adjudication which I have been able to find, and I am very certain none can be produced sustaining any such proposition. But the very formation, purposes and duties of a court forbid such an idea. The court is composed of judge, ministerial and executive officers, together with the attorneys that are members of it. To this body so organized are committed for determination the highest interests of the citizen in his property, his reputation and his person. And a careful record of every step which may be taken in relation to either must be carefully made; every paper connected with any proceeding affecting any one in either of these must be carefully filed and preserved. The title to the entire property of the whole country passes through the courts of this country almost in every half century. They are the repositories of the

rights of persons and of property, and in many cases the only evidence of either, and the law imposes upon the court the duty of their secure and careful protection and preservation; a protection and preservation which would be greatly jeopardized if every citizen of the United States, at his pleasure and will, should be permitted to examine and inspect them in his own way. Not only is such an idea in opposition to the formation, purposes and duties of the court, but it is clearly in opposition to the views of the highest judicial and legislative branches of this government. At a very early day the supreme court of the United States adopted a rule known as the fourth rule, which provides that "all motions, rules, orders, and other proceedings made and directed at chambers or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit of equity and their solicitors." If the supreme court believed that all the books and records belonging to the court were open to the inspection of every citizen of the United States, why did they enact such a rule? Or why did they limit the right of inspection to parties and their solicitors? This rule itself is the most convincing proof that no such right, as claimed by the petitioners, was supposed by the judges of the supreme court to have existed.

But it is claimed by the learned counsel for the petitioners, that there is a difference between suits in equity and at law; that there could hardly be a case in equity in which the government could have any interest. It is not perceived by the court upon what reason there can exist any difference in the care and custody of the records and papers in equity causes and actions at law, but learned counsel are mistaken in regard to the interest of the government in equity causes. The records of this court show numerous causes in equity in which the government of the United States is plaintiff. But it is said, if that is so, that the citizen is a party in interest, and would have a right to look into the records. In some general political sense it may be true that the citizen is a party in interest in every suit prosecuted in the name of the United States; but in a legal sense he is not such a party in interest as is contemplated by this rule.

§ 62. *Certain rights of inspecting the record are given by congress.*

That congress entertained the same view is abundantly shown by its acts. In 1848 it enacted a law providing that "all books in the office of the clerks of the circuit and district courts containing the docket or minute of the judgments or decrees thereof shall, during office hours, be open to the inspection of any person desiring to examine the same without any fees or charge therefor." If congress believed the right already existed, why did they think it necessary to create such right by special legislation? Or if they believed it ought to exist, why did they limit the right to particular books, such only as contained the docket or minutes of the judgments or decrees? And, again, by the act of February, 1875, congress provided: "That the accounts and vouchers of clerks, marshals and district attorneys shall be made in duplicate to be marked 'original' and 'duplicate,' and it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicate which shall be open for public inspection at all times." If the public had the right already to inspect such papers, why did congress deem it necessary to create such a right by the passage of this act?

§ 63. *Where the party is entitled to any of the relief prayed for, a general demurrer must be overruled.*

It is, therefore, very clear to my mind that the unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. The right to examine certain records and papers does exist. It exists as to the books containing the docket or minute entries of the judgments and decrees of the court, and these the petitioners allege that they have been refused by an officer of this court. The prayer of the petition is not in accordance with this averment, and the affidavit is different from both. This petition, however, must be governed by the rules of pleading in other cases, so far as the demurrer is concerned. If the party is entitled to any part of the relief he prays for, a general demurrer must be overruled.

This application for the interference of the court is based upon the allegation that the petitioners have been deprived of a right given them by the law by an officer of the court. This is denied on behalf of the officer by two members of the bar who are officers also of this court, and who appear in this proceeding on behalf of the clerk. This is a charge which the court is interested in having examined, and the truth or falsity thereof established. The demurrer will therefore be overruled, but no order will be made until a further hearing of the matter is had before the court, when we shall finally determine whether the petitioners are entitled to the order as prayed for.

BAXTER, J., concurred.

COCKE v. HALSEY.

(16 Peters, 71-88. 1842.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This cause comes before this court upon a writ of error to the circuit court of the United States for the southern district of Mississippi.

The statement of the case upon which the questions presented here for decision arise, is, as agreed by the parties upon the record, substantially the following: On the 24th of March, in the year 1838, James Carter and Lewis Grigsby, merchants, executed a deed of trust to one William L. Moore, as trustee, to secure the payment of certain sums of money to the Commercial Bank of Columbus. This deed was regularly acknowledged by the grantors, before a justice of the peace, on the 29th of March, 1839, and delivered to one William P. Puller, who had been appointed clerk *pro tempore* of the probate court of the county of Lowndes, in said state, and who recorded the deed in the office of the clerk of probate for said county, and indorsed thereon a certificate of record, signed William P. Puller, clerk *pro tempore*. That at the time this record and certificate were made by Puller, as clerk *pro tempore*, one Robert Haden was the clerk of probate for the county of Lowndes, duly elected, qualified and sworn; that Haden was elected in November, 1837, for two years, and entered on the discharge of his duties in the month of February, 1838; that Haden visited the state of Tennessee on business, and did not return in time to perform the duties of clerk at the March term of 1838. In consequence of his absence, the judge of probate, upon commencing the court of probate of the March term of 1838, appointed Puller to act as clerk during the absence of Haden. The deed of trust to Moore was recorded by Puller during the

absence of Haden, but after the March term of the court. Haden afterwards returned and resumed the duties of his office.

The original trustee, William L. Moore, having died, the superior court of chancery of the state of Mississippi, at the January term, 1839, duly appointed Stephen Cocke, the plaintiff in error, trustee in lieu of Moore. At the May term of the circuit court of the United States for the southern district of Mississippi, the defendants in error obtained a judgment against James Carter & Company. Execution was sued out upon this judgment, and levied by the marshal on the property mentioned in the trust deed, in the possession of Carter & Company. Upon the levy being made, Stephen Cocke, the trustee, claimed the property, gave the bond required in such cases by the law of Mississippi; and an issue was duly made to try the right to the property. Upon the trial of this issue, the following question was submitted to the court for its opinion thereon, namely: That if the deed of trust was properly and legally recorded, then it was admitted that the judgment in question was not a lien upon the property conveyed by the deed, and the trustee was entitled to the same; otherwise, if the deed was not legally recorded, the property was subject to satisfaction of the judgment. Upon this question the court below adjudged that the trust deed was not duly recorded; that the acts of Puller, as clerk *pro tempore*, in recording the deed, were without authority of law, and altogether void, and so instructed the jury. To this opinion of the court, thus given, the plaintiff in error excepted, and brings that opinion before this court for examination.

§ 64. *Appointment of clerks of courts in Mississippi.*

The fourth article of the constitution of Mississippi, thirty-first section, declares that the judicial power of that state shall be vested in one high court of errors and appeals, and such other courts of law and equity as shall be afterwards provided for in that constitution. The same article, after authorizing and ordaining various superior tribunals in which the judicial powers shall be vested, at length, in the eighteenth section, declares that there shall be established, in each county in the state, a court of probates, the judge whereof shall be elected by the qualified electors of the county for a period of two years. The nineteenth section of the same article declares that the clerks of the circuit, probate and other inferior courts shall also be elected by the qualified electors of the county for the period of two years. See Laws of Mississippi by Howard and Hutchinson, 24, 26.

The legislature of the state, in organizing their judiciary, as it was indispensable they should do (as the constitution had limited its own action to the direction that the courts therein named should be established, leaving their organization and distribution to the legislative authority), by a statute passed in March, 1833, and by sections 1, 2 and 3 of that statute, established a court of probates in each county of the state; provided for the election of judges and clerks of the several courts, prescribed to them the oath of office they should take, and to the clerks the bonds they should execute before assuming their official functions. Laws of Mississippi, 469. By the eighth section of the statute the legislature declared that in case the clerk of probate "shall be at any time unable, from sickness or other unavoidable causes, to attend said court, it shall be lawful for the judge of probate to appoint a person to act as clerk *pro tempore*, who shall take an oath faithfully to discharge all the duties of his office," etc. *Vide* p. 470, Laws of Mississippi. By the fifth section of the same statute vacancies in the offices of judge and clerk are to be filled

as the original appointments were made, viz., by election. By the fifth section of another statute of Mississippi, concerning real estate and conveyances, passed June 13, 1822, it is declared that deeds of trust and mortgages shall be valid as to subsequent purchasers for valuable consideration without notice and as to all creditors, from the time when such deeds of trust or mortgages shall have been acknowledged, proved or certified, and delivered to the clerk of the proper court to be recorded, and from that time only. From this provision the question of priority arises.

In support of the decision of the circuit court it has been insisted that the power of the judge of the probate court to appoint a clerk of probate, *pro tempore*, is limited to the term of the court and to the exigencies and necessities of the term, and does not extend to a period beyond the term, nor to any acts performed by the person so appointed out of court. From this position, claimed by counsel as a legitimate deduction from the statute, it is argued that the clerk, having been appointed by an exercise of power wholly illegal and void; nay, even without color of authority, his acts, too, must be merely void, and not entitled to the effects properly attributable to the acts of one who may be considered as an officer *de facto*, in contradistinction to him whose commission and qualification are in all respects regular, and who, therefore, may be called an officer *de jure* and *de facto*.

§ 65. — *the statute does not limit the appointment of a clerk pro tem. to the session of court.*

In reasoning from the language of the statute it would seem difficult to perceive anything in it which limits the appointment *pro tempore* to the session of the court. The expression in the law is, "from sickness or unavoidable causes;" now, it is quite as probable that these causes would operate beyond as well as during the continuation of the court. The only fair inference deducible from the words of the law is, that the causes requiring an appointment should, like the appointment itself, be temporary, so that the provision of the statute should not be perverted to cover a permanent disqualification of the regular clerk, and thereby prevent his removal or the election of a successor, under proper circumstances. The precise duration of that temporary cause it could hardly have been the intention of the law makers to define. To ascribe to them an intention to restrict the duties of a clerk, *pro tempore*, to the session of the court, would be imputing to them an act of utterly useless legislation, since none can fail to perceive, on looking into the law, that the duties of the clerk of probate are as extensive and as important during vacation as they are during term time, if, indeed, they are not more so.

§ 66. *Powers of officers de facto.*

Several authorities have been cited in argument, some from the English and some from the American cases, in order to show that the recording of the trust deed in question, by the clerk of probate, cannot be supported even as the act of the clerk *de facto*. These authorities, however, do not establish the position they have been brought to maintain, and in some instances they operate directly against it. The first case relied on (and it is a leading case) is that of *The King v. Lisle*, Andrews, 163, 174. This was a *quo warranto* to remove a burgess of Christ Church, on the ground that he had been nominated by one Goldwire, calling himself mayor of the corporation, when he had never been appointed mayor. The court say, the nomination by Goldwire could not be supported, because he was not even by any colorable title or pretext mayor of the corporation; evidently putting his act on the same footing with an

attempt at usurpation by any other private person. There is a remark by the court in delivering its opinion, which is regarded as not without its bearing upon the present case, and that remark is this: "That supposing Goldwire was mayor *de facto*, yet the acts here found to be performed by him are not good, because they were not necessary for the preservation of the corporation." In these cases the court say: "The proper distinction is between such acts as are necessary and for the good of the body, which comprehend judicial and ministerial acts, and such as are arbitrary and voluntary." The second case from the English books is that of *Knight v. The Corporation of Wells*, 1 Lutw., 509, 519. This was an action of debt against the corporation, upon their bond to the wife of the plaintiff; and the objection taken to the recovery was, that the person who put the corporate seal to the bond was not qualified by the charter to be mayor. He had been elected to the office of mayor, however. The case seems to have been much considered, for it was twice argued; and it was resolved by all the court, that although the mayor might not be qualified according to the charter, yet he had been elected, and, in virtue of his election, was mayor *de facto*, and that, therefore, all judicial and ministerial acts performed by him were good.

The cases of *The People v. Collins*, 7 Johns., 549, and of *McInstry v. Tanner*, 9 Johns., 135, are in the strictest accordance with the authority from Lutwyche. In *The People v. Collins*, the court say, in speaking of the powers exercised by the officers whose acts were impeached: "They were commissioners *de facto*, since they came into office by color of title, and it is a well-settled principle of law, that the acts of such persons are valid when they concern the public, or third persons who have an interest in the acts done; and this rule is adopted to prevent the failure of public justice. The limitation of this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility. The doctrine on this subject is to be found at large in the case of *The King v. Lisle, Andrews*, 163." So, too, in 15 Mass., 180, *Bucknam v. Ruggles*, this matter is very fully treated. The court say that, although the officer did not comply with the requisites of the constitution, yet, having been appointed, and thus having color of title, his acts are valid in respect to third persons who may be interested in such acts; that such a rule is necessary to prevent a failure of justice. Besides, the officer's title to his office ought not to be determined in a collateral way. In addition to other authorities to this point is quoted 3 Cru. Dig., tit. Officers, secs. 71, 75, for the principle that, by the test and corporation acts in England, all persons are disabled in law to all intents and purposes to hold certain offices, unless they take the oaths required; yet, notwithstanding this disabling clause, it has been held that the acts of officers not qualified by those statutes may be valid as to strangers. The case of *Williams v. Peyton*, cited for the plaintiff in error, from 4 Wheat., 77, is thought to have no application to the question now under consideration; all that was ruled in that case was this: that where a title depends upon the acts of a ministerial officer to be performed *in pais*, proof of the performance of those acts is necessary to sustain such title; a principle which none, perhaps, will dispute; but, whether affirmed or denied, cannot apply to the present case. So, too, of the case of *Davison v. Gill*, 1 East, 64, having been ruled exclusively upon a provision of the statute, 13 Geo. 3, ch. 78, requiring that certain proceedings of justices should, in relation to closing and opening ways, in order to give them validity, appear on the face of those proceedings, in a prescribed schedule or form set forth in the statute, is considered as wholly inapplicable.

If, then, the appointment and the acts of the clerk of probate depended for their validity upon the principles which apply to the acts of officers *de facto*, a just interpretation of the authorities adduced in behalf of the plaintiff in error gives validity to both. That the judge had power to appoint a clerk *pro tempore* seems never to have been questioned; that he did appoint is equally indisputable—the irregularity alleged is in the failure to limit the appointment to the term of the court. Admit, for the present, that the appointment should have been thus limited, and that the clerk has admitted the deed to probate after the term, yet, in his character of clerk, was he not within the very definition of the authorities, and within the concessions of the council, clerk *de facto*, acting *colore officii*; and must not his acts, therefore, be valid so far as regards third persons who are interested in them? An affirmative answer to this inquiry is unavoidable.

§ 67. — *the decision of the judge upon the exigency is final as to rights of third parties depending upon it.*

But the appointment of this officer, and his acts when so appointed, rest upon a foundation still broader and firmer than that which sustains the actings of an officer *de facto*. By the law of Mississippi, the judge had the power to appoint, *pro tempore*, whenever from sickness or unavoidable causes the clerk could not attend. By the investiture of that power, it remained with the judge, in the exercise of judicial discretion, to decide upon the propriety and necessity for the execution of the power; he did decide upon them, and he must be presumed to have decided properly. The correct legal principle applicable to such proceedings is this: That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority, and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this court, as in the cases of *Thompson v. Tolmie*, 2 Pet., 157 (§§ 475–479, *infra*); *United States v. Arredondo*, 6 Pet., 720; *Voorhees v. Bank of the United States*, 10 Pet., 473, and *The Philadelphia & Trenton Railroad Company v. Stimpson*, 14 Pet., 458. It cannot, then, be permitted, in this collateral inquiry, to insist that the judge has either misapprehended or transcended his authority; he has exercised the discretion vested in him by the statute; that discretion has led him to the conclusion that the necessity for an appointment was co-extensive with the absence of the ordinary clerk, an absence deemed by him unavoidable; and the discretion of the judge *pro hac vice*, at any rate, must be conclusive. But beyond these legal presumptions, this court, upon a review of the constitution and statute of Mississippi, are satisfied that the appointment of the clerk of probate *pro tempore* was fully warranted in the manner and to the extent in which it was made. They therefore decide that the decision of the circuit court for the southern district of Mississippi is erroneous, and accordingly do reverse the same.

IN RE WORTHINGTON.

(Circuit Court for Wisconsin: 7 Bissell, 455–459. 1877.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—On the 24th of December, 1874, Charles E. Storm and Robert Hill recovered a judgment against the bankrupt in the circuit court

of Milwaukee county for \$3,464. On the following day a transcript of the docket was filed in the clerk's office of the circuit court in Wood county, where the bankrupt had, at the time, real estate. Several months after this, proceedings in bankruptcy were commenced, and Worthington was adjudged a bankrupt in July, 1875. The judgment creditors made an application to the district court to direct the assignee to sell the real estate of the bankrupt, and apply the proceeds to the payment of the judgment, and to permit them to prove their claim for any balance that might be found due. This application was denied by the district court, on the ground that the act of filing the transcript by the clerk in Wood county was void, and gave the judgment creditors no lien upon the property, as it was done on Christmas day — a holiday under the laws of this state.

By the law of this state the clerk of the circuit court was required to keep a book for the entry of judgments, and immediately after entering the judgment the clerk was to file certain papers, which were to constitute what was called the judgment roll, which was to contain a copy of the judgment; and after this was done he was to enter in an alphabetical docket, in books to be provided and kept by him, a statement of the judgment, and containing certain particulars as set forth in the statute, namely: The names of the parties, the amount of the debt or damages recovered, with the costs, the hour and day of entering in the docket, etc., and then the judgment became a lien upon the real estate of the debtor. And when it was sought to cause the real estate of the debtor to become bound by the judgment in any other county than that where it was rendered, it became necessary to file with the clerk of the circuit court of that county a transcript of the original docket, and from the time of filing it constituted a lien on the property of the debtor in that county.

§ 68. *A merely ministerial act may be performed by the clerk of a court on a legal holiday, and still be valid.*

The question, then, to be determined in this case is, whether the act of the clerk in filing the transcript of the original docket in his office on Christmas day was a nullity under the laws of this state. The statute declares that no court shall be open or transact any business on the 22d of February or the 4th of July, unless to instruct or discharge a jury, or to receive a verdict, and the 25th day of December and the 1st day of January are declared to be holidays. If the act of the clerk was void, it was so under the common law or these statutes. At common law Sunday was deemed a non-judicial day, during which no courts could transact any business or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-judicial, were unknown as such; and when they are so declared, the inference would be that the prohibition extends no farther than is named in the statute. It is hardly to be presumed that ordinary business cannot be transacted in this state, and binding contracts entered into, on the 22d day of February or the 4th of July, and the question is whether, because the 25th day of December and the 1st of January are declared to be holidays, that, therefore, no ministerial act can be performed on those days by an officer of this state. It may be conceded that on those days a clerk could not be required to perform any duty connected with his office, because the state has declared it a holiday; but that is a very different thing from asserting that every ministerial act done by the clerk voluntarily on those days is necessarily void. The statute in relation to the 22d of February and 4th of July was passed in 1861; but when there was legislation in 1862 as to the 25th of December and 1st of January, there

was no prohibition in relation to the courts, except what might be inferred from the fact that they were declared holidays. It was not till afterwards (1869) that it was declared that when the day for the meeting of the court should fall on a legal holiday, it should be adjourned to the following day.

While at the common law no judicial act could be done on Sunday, the authorities seem to agree that mere ministerial acts could be performed, and the service of the process was regarded as a ministerial act, and therefore valid, although performed on Sunday, and the act of 29 Charles II. became necessary in order to render it invalid; and in the case of *Van Vechten v. Paddock*, 12 Johns., 187, which is relied upon by the district court, the supreme court of New York, in order to decide that the issuing of process on a Sunday was void, insisted that the awarding of the process was a judicial act, done whilst the court was in actual session, being thus obliged to resort to an acknowledged fiction to sustain its opinion.

If ministerial acts performed on Sunday were not invalid at common law, for a stronger reason those performed on Christmas day would not be invalid. It is a curious fact that while the judge of the court who gave the opinion in *Van Vechten v. Paddock* seems inclined to hold that the service of process on Sunday was illegal at common law, the judge who delivered the opinion in *Johnson v. Day*, 17 Pick., 106, declares that an arrest on civil process on Sunday was legal at common law, and that is the opinion of the judge who decided the case of *Pearce v. Atwood*, 13 Mass., 324, where the subject is thoroughly discussed. The district court relied upon the case of *Lampe v. Manning*, 38 Wis., 673, as deciding that the act of the clerk here in question was void. But in fact that case only decided that a trial and judgment rendered by a justice of the peace on the 23d day of February, and which, under the statute, as coming on Monday, was to be treated as the 22d—and therefore a holiday—were invalid, and should be regarded as a nullity, and the court says nothing about the effect of ministerial acts done on a holiday. The natural conclusion would seem to be that when the state legislature, in 1861, legislated in relation to the 22d of February and 4th of July, and made prohibitions, and then again legislated in 1862 as to the 25th of December and 1st of January, the prohibitions should not, by construction merely, be enlarged.

§ 69. — *the act of a clerk of a court in filing the docket transcript of a judgment is purely a ministerial act.*

It may be admitted that the entry of a judgment by which a man's property is to be bound, or, as it is termed in the statute of this state, the docketing of the same, is a very important act. The entry of the judgment is judicial, but is the docketing of the judgment by the clerk anything more than a ministerial act? There is no exercise of discretion or of judgment, but the language of the statute to him is mandatory. He shall do certain things, and they are particularly described, and in relation to them he can have no discretion; and it would seem that they were mere ministerial acts. And while this is true of the act of the clerk who docket the judgment in the court where it is rendered, it would seem that where it is transferred to another county and docketed there, that there could be, if possible, less doubt of the character of the act to be performed by the clerk of that county; because all that the statute requires is, that a transcript of the original docket shall be filed with the clerk of the circuit court of the county, so that all that is necessary for the clerk to do is simply to receive the transcript which is brought to him, and file it, and mark it with the date when it is filed. This certainly can be considered

nothing more than a ministerial act, not void at common law, and, I think, not rendered so by any statute of this state.

There does not seem to be any statute of this state, which, when fairly considered, declares that no official act shall be performed on a holiday. In referring to holidays I do not intend to include Sundays, as to which there is considerable prohibitory legislation by this state, affecting business, public and private, labor, amusements and the service of civil process. I think, therefore, the act of the clerk of the circuit court of Wood county in filing the docket transcript was not void, but that the judgment creditors acquired a lien on the real estate of the bankrupt in that county. The order of the district court will therefore be reversed; but as the judgment of this court cannot be reviewed in this case, I shall authorize the district court, if it shall consider it best, to permit the judgment creditors to proceed on their judgment, and sell the real estate of the bankrupt in Wood county; and then if the other creditors of the bankrupt desire, the right of the purchaser to the property can be tested by the assignee.

§ 70. The appointment of courts is by the sovereign power. This power may be delegated to subordinates, or to military officers; but this last mode is so unusual that there is no presumption of the legitimacy of such a court when it exists in a foreign country, and its decree is brought in question in a court of the United States. The party who relies upon the authority of that decree must show that the court was lawfully constituted. *Snell v. Faussatt*, 1 Wash., 274.

§ 71. The circuit court of the United States consists of two judges for each district — the district judge and the supreme court justice allotted to that circuit; but either may hold term in the absence of the other. *Pollard v. Dwight*, 4 Cr., 429.

§ 72. Judge acting after resignation.—If a judge of a federal court tenders his resignation of his office, but continues to perform the duties of his office until his successor shall be appointed, a decree in admiralty entered by him is a valid decree. *Northrop v. Gregory*, 2 Abb., 504.

§ 73. Change of time of holding.—When, by act of legislature, the time of holding a court is changed, all causes pending therein are returnable, have day and are decided, as though the change had not been made, and the change of time does not amount to a discontinuance of such actions, though the act contains no such specific provision. *Boswell v. Newton, Hemp.*, 264.

§ 74. Judicial proceeding — Due process of law.—Although the proceedings by which taxes are collected are not regular judicial proceedings as a suit in court is, yet they are such "due process of law," that one who is compelled to pay a tax cannot object that he has been deprived of property without due process of law, so as to bring the case under section 1 of the fourteenth amendment of the federal constitution. *Kelly v. Pittsburgh*, 14 Otto, 80.

§ 75. Judicial and legislative power.—The limitation of the executive, judicial and legislative departments of government is sometimes difficult to define. The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, a judicial power; and so a court, in the use of a discretion essential to its existence by the adoption of rules or otherwise, may be said to legislate. *Watkins v. Holman*, 16 Pet., 25. See §§ 43, 44.

§ 76. Certain privileges are granted to certain courts of Maryland by the particular grant of the legislature of that state. These privileges do not extend to the courts of the United States sitting in that state. *Forrest v. Hanson*, 1 Cr. C. C., 12.

§ 77. A state law forbidding courts to be held on a holiday, though not of any power over United States courts, would, by comity, probably regulate their practice. *In re McGlynn*, 2 Low., 128.

§ 78. Courts will not inquire, collaterally, whether the president is such de jure.—If a marshal's commission is issued by a person actually exercising the office of president of the United States, a court will not inquire whether he is president *de jure*, on a motion to discharge a prisoner arrested by such marshal. *Peyton v. Brent*, 3 Cr. C. C., 424.

§ 79. Law binding on the courts.—When a law prescribing a tax on oil makes a certain definite percentage allowance for leakage, the courts of the United States are bound by this law, and cannot make any extra allowance when the actual leakage has exceeded the per cent. allowed. *United States v. Barrows*, 1 Abb., 354.

§ 80. **Power over judgment after lapse of term.**—The orphans' court of the District of Columbia, though in effect a court of chancery, may have a review of its decree after the decree is enrolled and the term of the hearing elapsed, but it cannot grant a rehearing after such period has elapsed. *Mauro v. Ritchie*, 3 Cr. C. C., 151. See § 45.

§ 81. A defendant against whom a decree had been rendered in the circuit court, at a subsequent term, filed a bill of review and moved to set aside the decree and dismiss the cause for want of jurisdiction. *Held*, the court had not power so to do. *Cameron v. McRoberts*,* 3 Wheat., 591.

§ 82. **Power over decrees.**—The power to amend a decree so as to make it conform to what was the purpose and intention of the court and the justice of the case may be exercised by the court at all times, while the record remains before them and the proceedings are *in fieri*; but the opening, setting aside or vacating a judgment upon a motion after an intervening term is a rare exception to the general practice. So held when the motion was made nearly three years after the judgment, and the court dismissed it for lack of diligence. *Figb v. United States*,* 3 Ct. Cl., 97.

§ 83. **Power over attorneys.**—A court has power to disbar an attorney upon charges of malpractice, upon a summary hearing. *Ex parte Burr*, 2 Cr. C. C., 380. See ATTORNEYS.

§ 84. It is the inherent right of each court to regulate its own rules of practice, including the terms of admission of attorneys to and dismissals from the bar. Petition to be admitted as attorney, connected with a motion to rescind the rule that each candidate before admission shall take an oath similar to that prescribed by the act of congress of July 2, 1862, for officers of the United States, on the ground that the unconstitutionality of the rule had been determined by the supreme court, whose opinion was mandatory on this court. Motion denied on the above principle. *Ex parte Magruder*,* 15 Am. L. Reg., 292.

§ 85. **Declaring law unconstitutional.**—It is the duty as well as the power of the federal courts to declare a law unconstitutional which impairs the obligation of contracts. *Green v. Biddle*, 8 Wheat., 92. See CONSTITUTION AND LAWS.

§ 86. It is the duty of a court to pronounce upon the constitutionality of statutes brought before it. The quieting and confirming act of Pennsylvania is opposed to the constitution of that state, and is unconstitutional and void. *Vanhorne v. Dorrance*, 2 Dal., 319.

§ 87. **Rendering and executing judgment.**—The federal courts have equal powers with the several state courts to render judgment and carry it into execution; and their forms and modes of procedure in law are the same. *Georgia v. Atlantic & Gulf R. Co.*, 3 Woods, 436.

§ 88. **Opening judgment.**—The court has power to open a judgment rendered upon default for the purpose of correcting errors of fact in the amount of the judgment, arising from the inadvertent omission of the plaintiff to give credits and allow payments made by the defendant, or out of his property, upon the claim of the plaintiff, which should have been deducted at the time of the assessment of damages. *United States v. Millinger*, 7 Fed. R., 849.

§ 89. **Reversing former rulings.**—When a cause is sent from the supreme court back to the court of appeals, no limit is placed upon the discretion of that court as to reversing its former findings. *Ex parte Medway*, 23 Wall., 506.

§ 90. **Appointing examiners.**—This court has authority, under the acts of congress and the rules of the supreme court, to appoint examiners, and it is wholly discretionary whether they shall be appointed standing examiners or be named as the occasion arises for their services in any cause. So held when the proof was taken before one of the standing examiners without his having been specially appointed examiner in the cause. *Van Hook v. Pendleton*, 2 Blatch., 85.

§ 91. **Distributing funds in court.**—Courts of common law as well as courts of equity and admiralty have full power to make distribution of funds brought into their custody by their process. *Westcot v. Bradford*, 4 Wash., 498.

§ 92. **A court should not do indirectly that which it cannot do directly;** for instance, grant a rehearing in a bankruptcy matter in order to allow an appeal, after the time limited for appeal after the first hearing has elapsed. *In re Troy Woolen Co.*, 5 Ben., 416.

§ 93. **Deciding hypothetical case.**—A judge cannot be required to declare the law on hypothetical questions which do not belong to the cause on trial. If the party asking the question is aggrieved by the refusal to declare the law on such a question, he may except. *Etting v. Bank of United States*, 11 Wheat., 75.

§ 94. **Deciding all points raised by the record.**—Where the record presents several points to be decided, and of such a nature that the decision of one decides the case, the court may still proceed to decide the others, and none of the decisions can be considered an *obiter dictum*. *Hawes v. Contra Costa Water Co.*, 5 Saw., 295.

§ 95. **Excluding spectators.**—While courts of justice should be open, their police should be maintained. If the attendance of a class of persons is likely to raise a disturbance by their

actions, they may be excluded partially or wholly at the discretion of the court officers. *United States v. Buck*,* 4 Phil. R., 168.

§ 96. **Enforcing performance of duty enjoined by law.**—The heads of departments of the national government, to whom are given by the president the discretionary exercise of various important political powers, are not responsible to individuals, in courts of law, for the mode of exercising those powers. But when a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the courts of law have power to enforce the performance of that duty. *Marbury v. Madison*, 1 Cr., 166.

§ 97. **Restoration of property abstracted from its custody.**—The circuit court of the United States has power to compel, by summary process, the restoration of any property abstracted from its custody, whether the abstraction is by a party to the suit concerning such property or not. If shares of stock abstracted from the custody of the court have a valuable privilege attached to them, which is a part of their value, and the person abstracting the shares destroys such privilege, he may be compelled to restore it, or, in default thereof, to make good the pecuniary value of such spoliation. *Erie R'y Co. v. Heath*,* 8 Blatch., 536.

§ 98. **Controlling ministerial act.**—The circuit court for the District of Columbia, on motion, quashed an inquisition condemning land of Custiss for a turnpike road. The act of congress directs that the inquisition, when taken, shall be signed by the marshal and jury-men, and “returned by the marshal to the clerk of the county, to be by him recorded.” *Held*, that the recording is solely for the purpose of preservation, and is a ministerial act not subject to the control of the court. Therefore, the judgment of the circuit court was reversed. *Custiss v. Georgetown, etc., Turnpike Co.*,* 6 Cr., 233.

§ 99. **The army always, and militia while in service, are amenable only to the military authorities.** *Ex parte Bright*,* 1 Utah T'y, 155.

§ 100. **Mandamus — To compel the signing of bill of exceptions.**—The supreme court of the United States has power to issue a writ of *mandamus* to a judge of the circuit court, commanding him to sign a bill of exceptions, or to review, correct and settle a bill already signed. This is an exercise of the appellate jurisdiction of the court. The court, however, will not issue a *mandamus* to compel a judge to spread the whole of a charge to the jury upon the bill of exceptions. The charge includes both a summing up of evidence as well as directions as to law, and the former is not a proper subject of a bill of exceptions. *Ex parte Crane*, 5 Pet., 192.

§ 101. The supreme court of the United States has no power to order, on a rule to show cause, the district court judge to sign a bill of exceptions handed to the judge several weeks after the trial, and which he is requested to correct from memory, but which he refuses to sign. *Ex parte Bradstreet v. Thomas*, 4 Pet., 104.

§ 102. — **to compel the signing of a judgment.**—A district court judge in the district of Louisiana rendered judgment, but died before signing it. The party in whose favor the judgment was given moved the supreme court for a writ of *mandamus* to compel his successor to sign the judgment. It was held that the signature was a necessary consequence of the judgment, and the successor had no discretion about signing it, and that the *mandamus* should issue. *In re Life & Fire Ins. Co. v. Wilson*, 8 Pet., 303.

§ 103. — **to compel the allowance of an amendment.**—In a suit brought in the district court of the United States, no averment of value of the thing in controversy was made. The suit was accordingly dismissed. The judge refused to allow an amendment stating the value to be over \$500. On application to the supreme court for a *mandamus* to compel the allowance of such amendment, it was held that the allowance of amendments was wholly in the discretion of the district judge. *Ex parte Bradstreet*, 7 Pet., 647.

§ 104. — **to compel the making of a record.**—A writ of *mandamus* will be issued by the supreme court of the United States to order a district court judge to make up a full record of a case, so as to allow a writ of error. *Ibid*.

§ 105. **Clerks.**—If a deputy clerk, in making up a judgment, mistakenly infers that interest is not legally a part of the judgment, and the attorney gives him no directions as to the judgment, this does not form such want of skill or negligence as will render the clerk liable. *Patons v. Lee*, 2 Cr. C. C., 646. See §§ 48, 49.

§ 106. Under the statute of 1810, the clerks of the county courts of Kentucky have authority to take acknowledgments and privy examinations of *femes coverts*, in cases of deeds made by them and their husbands. *Elliott v. Peirsol*, 1 Pet., 339.

§ 107. The acts of congress organizing the courts of Louisiana empowered the district judge to appoint a clerk of court. No tenure of office nor form of appointment or removal were prescribed. *Held*, that the office is held at the will of the appointing power, and notice of removal and of the appointment of a successor will be sufficient when such appointment has in fact been made. *Ex parte Hennen*,* 13 Pet., 230.

§ 108. A defendant against whom a judgment had been rendered, payable in specie, paid to the deputy clerk the amount of the judgment in Indiana paper, stating that plaintiff had agreed to accept this, and took a receipt. Plaintiff denied the agreement and took out execution. On this state of facts the court refused to set aside the execution on motion. Subsequently a motion was made for a rule on the clerk to pay to defendant the money received by his deputy. *Held*, this motion did not raise the question of the clerk's power to give a discharge on receiving the amount of the judgment, but the custom of so doing would ordinarily fix the liability of the clerk. This, however, could not be considered a *bona fide* payment, and the act of the deputy out of the line of his duty would not bind the clerk. *Welldes v. Edsell*, * 2 McL., 366.

§ 109. No reporter has or can have any copyright in the written opinions delivered by the court. *Wheaton v. Peters*, 8 Pet., 668.

§ 110. Writ protects officer.—When an officer is given a writ directing him to seize certain property, described in the writ, as in writs of replevin, orders of sequestration in chancery and process in admiralty, if the court had jurisdiction and the officer takes the property described, he is protected by his writ, no matter whose the property is. But when the writ only commands the officer to seize the property of a certain person, the officer must see to it at his peril that the property he seizes belongs to the person named in his writ. *Buck v. Colbath*, 3 Wall., 343.

§ 111. Liability of officer where there is no jurisdiction.—Where a court has no jurisdiction of the subject-matter of a case, yet assumes it, or where an inferior court has jurisdiction over the subject-matter, but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non judice*, the ministerial officer who executes the decree of the court is liable to an action for false imprisonment. *Dynes v. Hoover*, 20 How., 80.

§ 112. Leave to sue receiver.—When a state court appoints a receiver of a railroad, and allows him to operate it, a court in a different jurisdiction will not entertain a suit against such a receiver unless leave to sue him has first been obtained from the court which appointed him. And this leave is a jurisdictional fact, and if the lack of it is pleaded in abatement of such suit, judgment must be for the defendant. *Barton v. Barbour*, 14 Otto, 131.

§ 113. Records.—The minutes made by a clerk of court to refresh his memory in making up the record are not the record. The history of the case written at length in the record book, in technical language, is the record. When so written the clerk has no power to alter it, but the court may, *it seems*, order clerical errors to be amended. *Barnes v. Lee*, 1 Cr. C. C., 431. See § 47.

§ 114. The "judgment roll" mentioned in section 269 of the Oregon code is not the whole record at which a federal court will look to see whether a state court had jurisdiction of a case in which it has given judgment. *Neff v. Pennoyer*, 3 Saw., 281.

§ 115. The maxim that equity looks upon that as done that ought to have been done does not supply the omission of part of a record of judicial proceedings by the clerk of the court, whose duty it was to have recorded them. *King v. French*, 2 Saw., 445.

§ 115a. On an application for an authentic copy of an opinion of the court, Marshall, C. J., decided that the reporter only could furnish a certified copy, and that the clerk could certify, under the seal of the court, that he is the reporter, if this should be required. *Anonymous*,* 3 Pet., 397.

§ 116. The dockets of the courts of the District of Columbia are its records. *Washington, etc., Steam Packet Co. v. Sickles*, 24 How., 338.

§ 117. The certificate of a clerk of court cannot certify the legal character of a paper of which a transcript is appended, *e. g.*, that it is a judgment roll. He can only certify that the transcript is a true copy of the original. *Alexander v. Knox*, 6 Saw., 61.

§ 118. The errors for which a bill of review will lie must be apparent on the record. The record means the bill, answer and other pleadings and decree. In England the error must be apparent on the decree, but the decree recites the substance of the bill, answer and facts on which the decree is based. *Whiting v. Bank of United States*, 13 Pet., 14.

§ 119. The proceedings to restore lost or destroyed records of the United States circuit court must conform to the acts of congress (16 U. S. Stat., 474, and 17 U. S. Stat., 41), and not to any state laws. *Turner v. Newman*, 3 Biss., 308.

§ 120. The admission of an alien to citizenship is a judicial act, and must be found upon the records of the court. Where docket entries are regarded by the court in which they are made as records, they are records in other courts when used as evidence. *In re Coleman*, 15 Blatch., 420.

§ 121. The power to hear and determine a cause is jurisdiction, and if a petitioner states such a case that the court upon demurrer could give him judgment, the court has jurisdiction. *United States v. Arredondo*, 6 Pet., 709.

§ 122. **Nature of jurisdiction — Exceptions to it.**— The jurisdiction of courts is a branch of the sovereign power of a nation. It is therefore absolute and exclusive within the territory of the nation, except when the nation itself has, either expressly or impliedly, allowed exceptions to it. In accordance with principles of international law, one of these exceptions is the case of national ships of war, entering the port of a friendly power open for their reception, which are exempt from the jurisdiction of that power. *Schooner Exchange v. M'Faddon*, 7 Cr., 135.

§ 123. **Jurisdiction of defendant necessary.**— A decree of a court made without notice to or appearance by the defendants is without jurisdiction. *Hollingsworth v. Barbour*, 4 Pet., 467.

§ 124. **Non-resident defendant.**— When a purely personal suit is brought against a non-resident defendant in a state court, a judgment upon service by publication is void, except it touches some property in the state or defines a *status* of the plaintiff towards the defendant. *Galpin v. Page*, 3 Saw., 111.

§ 125. It is a well established rule, that, in order to give a court jurisdiction of a suit against one who does not reside within its jurisdiction, there must either be personal service upon him or a voluntary appearance by him, or the suit must be *in rem* against some property of his within the jurisdiction of the court. *Pennoyer v. Neff*, 5 Otto, 720.

§ 126. **Service on agent of corporation.**— A judgment obtained in a state court, when sued upon in a federal court, may be shown to have been obtained by fraud or that the court had no jurisdiction. When a judgment is obtained in a state court against a corporation incorporated in another state, and the only service upon the corporation was by service upon its agent in the state where the suit was brought, but such agent was not authorized to receive service, the judgment in that suit is void. *Warren Manuf'g Co. v. Aetna Ins. Co.*, 2 Paine, 511.

§ 127. **Objection to jurisdiction.**— A defendant who is served with process cannot raise the question of jurisdiction as to another defendant named in the writ, but who was not served, and is therefore no longer in the case. *Craig v. Cummings*,* 2 Wash., 505.

§ 128. A plea that a cause of action did not arise within the local jurisdiction of the court is a plea in bar when made before a court whose jurisdiction is locally limited. *Smith v. M'Cleod*, 1 Cr. C. C., 43.

§ 129. Objection to the jurisdiction may be made on motion for a new trial. *Codman v. The Vermont & Canada R. Co.*,* 17 Blatch., 3.

§ 130. When want of jurisdiction appears on the face of the pleading, the objection should be taken by demurrer; when not, then by plea; a motion to dismiss is not proper. *Varner v. West*,* 1 Woods, 494.

§ 131. **Jurisdiction at law and in equity.**— In general, a court of equity is the more eligible tribunal for cases involving latent defects in a land title, for as the pleadings must specify the defects, there can be no surprise against the tenant; but where a grant is absolutely void, as where a state has no title to a thing it grants, or an officer had no authority to issue the grant, the validity of the grant is examinable at law. *Polk v. Wendal*, 9 Cr., 99.

§ 132. Courts of law and courts of equity have concurrent jurisdiction of some cases of fraud. *Seabury v. Field*, McAl., 64.

§ 133. The court may strike out the name of a party to prevent its jurisdiction from being ousted. *Greeley v. Smith*,* 3 Story, 77.

§ 134. **Power of state to regulate jurisdiction of its courts.**— Each state has full power to make political subdivisions of its territory for municipal or judicial purposes and to regulate at pleasure the jurisdiction of its courts. *Missouri v. Lewis*, 11 Otto, 30.

§ 135. **Power of legislature over jurisdiction.**— In an action of ejectment, it was held that the state legislature has power to pass laws affecting the jurisdiction of courts, though the constitution prescribes the jurisdiction. *Bank of Hamilton v. Dudley*, 2 Pet., 524.

§ 136. An act giving a limited jurisdiction should be construed strictly as regards the extent of the jurisdiction, but liberally with regard to the mode of proceeding. *Russell v. Wheeler*, Hemp., 6.

§ 137. **Jurisdiction by seizure of property.**— Under the acts of congress of August 6, 1861, and July 17, 1872, for the confiscation of the property of rebels, a seizure may be made of stocks in a corporation by serving a notice on the officers of the corporation. Seizure of some kind is necessary to give the court jurisdiction to condemn, but the seizure is to be as near as may be like the seizure in admiralty and revenue cases, and in admiralty the practice exists of seizing property by notice, when it is of such a nature as not to be reduced to actual possession. *Miller v. United States*, 11 Wall., 292.

§ 138. **In proceedings in rem**, the proper forum is that within whose jurisdiction the *res* is found at the time of beginning suit. *The Bee*, 1 Ware, 337.

§ 139. **Jurisdiction as affected by war.**— A court of South Carolina has no jurisdiction to decree a sale of real estate within its jurisdiction, but belonging to residents in one of the

loyal states during the war, although the action was begun prior to the war. *Livingston v. Jordan*,* 10 Am. L. Reg. (N. S.), 53.

§ 140. During the occupation of New Orleans by federal troops in the war of the rebellion, the municipal courts were allowed to continue the proceedings by the general in command. He was sued in one of those courts for trespass to goods, and defaulted. The supreme court of the United States held that the municipal court had no jurisdiction over the general, and the judgment was void. (CLIFFORD and MILLER, JJ., dissenting.) *Dow v. Johnson*, 10 Otto, 166.

§ 141. "The existence of war closes the courts of each belligerent to the citizens of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process." Hence "the citizens of California and Illinois have a right to seek the courts of the United States in Texas, or to proceed with suits commenced therein previous to the war, to protect their property there situated from seizure, invasion or disturbance by citizens of that state, so soon as those courts have opened, whether official proclamation were made or not of the cessation of hostilities." *Masterson v. Howard*, 18 Wall., 99.

§ 142. Jurisdiction in prize cases.—To the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize; but if a captured vessel is brought or voluntarily comes *infra præsidia* of a neutral nation, that nation will extend its examination so far as to see whether a trespass has been committed on its own neutrality by the vessel which has made the capture. *The Estrella*, 4 Wheat., 303. See WAR.

§ 143. The question of prize or no prize belongs exclusively to the courts of the captor; but if the captor infringe the neutrality of a neutral state, and is brought before a court of that state, that court may examine into the question of such infringement. *The Antelope*, 10 Wheat., 125.

§ 144. The courts of a neutral have jurisdiction over all prizes taken by the public ships of war of a belligerent and brought within the local jurisdiction of the neutral court. Such court has, however, no jurisdiction over the public ships of war. They are responsible only to their own sovereign. *The Santissima Trinidad v. The St. Ander*, 7 Wheat., 351.

§ 145. When prize taken by a belligerent is brought into a neutral port and there libeled and taken possession of by the court in order to decide the suit, such possession of the court ousts the possession of the captors; and a decree of condemnation procured by the captor in a court of his own country, and after the suit in the neutral court is begun, and the possession of the captor divested, does not affect the decree rendered in the neutral court. *Ibid.*

§ 146. No jurisdiction conferred by unconstitutional law.—When a state constitution provides that "the right to trial by jury shall remain inviolate," and also that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury — nor shall he be deprived of life, liberty or property unless by the judgment of his peers or the law of the land," a law passed by the state legislature which provides that when liquors unlawfully kept for sale are seized and condemned before a justice of the peace, and a fine inflicted on the owner, he must, if he wishes to appeal to a court where he can have a jury trial, give a bond with sureties, to pay any fine which may be there imposed and costs, is unconstitutional as not being according to the law of the land. Any order, therefore, made by the justice is without his jurisdiction and void. *Greene v. Briggs*, 1 Curt., 333.

§ 147. A state law conferring certain criminal jurisdiction upon justices of the peace to inflict fine and forfeiture, a trial by jury being at the same time denied, unless the accused complies with certain conditions which he is not bound to comply with, is unconstitutional and wholly void. If a justice makes an order under the statute, he acts without jurisdiction, and his order is void, and he and all ministerial officers who execute the order are trespassers. *Ibid.*

§ 148. Collateral attack.—If a court in which proceedings are had has jurisdiction to render the judgment which it does render, no error in its proceedings which does not affect the question of jurisdiction will render the proceedings void, nor can such errors be considered when the judgment is brought collaterally into question. *McGoon v. Scales*, 9 Wall., 30.

§ 149. Where land was attached under the provisions of a state statute, and sold on execution, and the validity of the sale affirmed by a court of general jurisdiction of the state, it was held that this affirmation was conclusive in the United States supreme court, since it appeared that the court making the decision had jurisdiction of the case. *Ibid.*

§ 150. Agreement to arbitrate.—A contract which binds the parties not to bring any disputes arising out of the contract to a court of law, but to submit them to an arbitrator, does not oust the courts of jurisdiction, and is valid. *Fox v. The Railroad*, 3 Wall. Jr., 245.

§ 151. Decree of sale under attachment.—The judgment of a court of general jurisdiction ordering a sale of property seized on attachment is a judicial affirmation of the validity of the seizure. *Voorhees v. Bank of the United States*, 10 Pet., 472.

§ 152. **Order for the distribution of funds in court.**—Where, on a bill to foreclose a mortgage by sale, a fund is paid into court by the defendants as payment of the mortgage debt, and by agreement of the solicitors of plaintiff and defendants this sum is to be paid out to the plaintiff's attorney for previous services for his client, and an order to this effect is made by the court, this order is wholly without the jurisdiction of the court. *Wolfe v. Lewis*, 19 How., 281.

§ 153. **Void decree.**—Where a court dismisses an appeal of a suit for land because neither party has an interest in the land, this decree is void for want of jurisdiction, and binds nobody. *Lownsdale v. Portland, Deady*, 7.

§ 154. **When jurisdiction must appear upon the record.**—Courts of general jurisdiction need not show their jurisdiction upon the face of the pleadings. Courts of limited and special jurisdiction must. *Bank of the United States v. Voorhees*, 1 McL., 223.

§ 155. When a court exercises a limited and special jurisdiction, all the facts necessary to support that jurisdiction should appear of record. So held in regard to the repeal of a patent under the summary process given by section 10 of the patent act of February 21, 1793, chapter 11. *Ex parte Wood*, 9 Wheat., 606.

§ 156. When a statute gives a summary process as a means of enforcing a right, *e. g.*, a summary process to collect a tax by sale of land, this jurisdiction being special and limited, every fact necessary to give the court jurisdiction, *e. g.*, a report of the collector that there is no personal property on which the tax may be levied, must appear on the record; if not, the proceedings are *coram non judice* and void, not merely voidable. *Thatcher v. Powell*, 6 Wheat., 125.

§ 157. When a special limited jurisdiction is conferred on a court, such as the jurisdiction conferred by act of congress upon the courts of Florida in regard to disputed Spanish land claims, any suit brought in such special limited jurisdiction must contain in the record allegations showing the jurisdiction of the court. *United States v. Clarke*, 8 Pet., 444.

§ 158. **Presumptions as to jurisdiction.**—After verdict a court will indulge every reasonable intendment in favor of its jurisdiction. *Duryee v. Webb*,* 16 Conn., 558.

§ 159. All presumptions are made in favor of the record of proceedings in a court of general jurisdiction, or of limited jurisdiction, if the jurisdiction plainly appears. *Miller v. United States*, 11 Wall., 299.

§ 160. Every presumption is made in favor of the jurisdiction and regularity of proceedings in a court of general jurisdiction. When, however, a person relies on the judgment of a court of limited or special jurisdiction, he must show that the case was within such jurisdiction. *Tolmie v. Thompson*, 3 Cr. C. C., 123.

§ 161. When a decree is given by a court of general jurisdiction, and it appears by the record that the plaintiff may have been either a natural person or a board of commissioners which was not a body corporate and had no authority to bring suit, it will be presumed that the former was the plaintiff. *Alexander v. Knox*, 6 Saw., 60.

§ 162. It was held that while there is a presumption in favor of the jurisdiction of courts of general jurisdiction, yet that in the federal courts no such presumption exists as to the jurisdiction of state courts as to persons or property outside their territorial jurisdiction. In such cases the acquiring of jurisdiction must appear affirmatively on the record. *Galpin v. Page*, 3 Saw., 109.

§ 163. As the county courts of Oregon, when sitting as courts of probate, are, by statute, courts of general jurisdiction, an allegation of a jurisdictional fact in the record of a probate decree, *e. g.*, that the intestate was an inhabitant of the county, is conclusively presumed to be true in a collateral proceeding. *Holmes v. Oregon & Cal. R. Co.*, 7 Saw., 384.

§ 164. Any judgment of any court may be collaterally attacked on the ground of want of jurisdiction. A court of general jurisdiction is presumed, in a collateral proceeding, to have had jurisdiction. But this presumption only extends to persons and subject-matter within the territory of the court. If a judgment is rendered against a person or property outside such territory, there is no presumption of jurisdiction in favor of courts of general jurisdiction. *Gray v. Larrimore*, 4 Saw., 644.

§ 165. When a state statute provides that execution may issue after the death of the judgment debtor, if notice is given to his executors or administrators, the supreme court of the United States will not presume that such notice has been given, so as to confer jurisdiction on the state court to issue an execution. The presumption as to jurisdiction does not apply. *Ransom v. Williams*, 2 Wall., 318.

§ 166. When by a state statute a judgment in a purely personal action is allowed to be rendered after service, if the defendant cannot be found, on any white person of his family above fourteen years of age, at his dwelling-house or usual place of abode, this mode of acquiring jurisdiction being a departure from the common law rule, the usual presumption in favor of the jurisdiction of superior courts will not arise, but every fact necessary to give the service completeness must be alleged in the officer's return. *Setlemier v. Sullivan*, 7 Otto, 447.

III. JURISDICTION OF UNITED STATES COURTS.

1. *In General.*

SUMMARY — *Presumptions*, § 167.— *Objection to, how taken*, § 168.

§ 167. There are no presumptions in favor of the jurisdiction of the federal courts. Where jurisdiction is claimed on the ground that the action arose under the laws of the United States, the fact must appear on the record. *Ex parte Smith*, § 169.

§ 168. Where the citizenship of the parties is properly averred, objection to the jurisdiction of the court on this ground may be taken only by plea in abatement. *Carter v. Bennett*, §§ 170-172.

[NOTES.— See §§ 173-227.]

EX PARTE SMITH.

(4 Otto, 455, 456. 1876.)

PETITION FOR A MANDAMUS to U. S. Circuit Court, Western District of Tennessee.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.— The relators, citizens of the state of Tennessee, sued Lewis Anderson, also a citizen of that state, December 31, 1873, in the circuit court of the United States for the western district of Tennessee, to recover possession of certain lands in that district to which they claimed title in fee through a certificate of the United States direct tax commissioners, under the "Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7, 1862 (12 Stat., 422). The declaration is as follows:

"The plaintiff sues the defendant to recover the following tract of land lying in Shelby county, district No. —, and bounded as follows: Lots Nos. two (2), three (3), four (4) and sixteen (16), Cannovan's subdivision, sixty by one hundred and sixty (60 by 160) feet, assessed to W. H. Bowers in 1860, containing —, of which the plaintiff was possessed, claiming in fee, through a certificate of the United States direct tax commissioners, Jno. B. Rodgers, E. P. Ferry and Delino F. Smith, —, under an act of congress entitled an act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes, and the acts amending the same, on the 1st of January, 1865; and after such possession accrued, the defendant, on the 1st day of December, 1865, entered thereupon, and unlawfully withholds and detains the same, together with \$5,000 due for detention thereof."

Summons was served April 24, 1874, and June 12th Anderson moved to dismiss the suit for want of jurisdiction, as the parties were all citizens of Tennessee. This motion was granted March 1, 1877; and the value of the property in dispute being, as is alleged, less than \$5,000, Smith and Hurst now ask for a *mandamus* requiring the circuit court to take jurisdiction, and hear and determine the cause upon its merits. Jurisdiction is claimed for the circuit court under section 2 of "An act further to provide for the collection of duties on imports," approved March 2, 1833 (4 Stat., 632), which provides "that the jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law."

§ 169. *The jurisdiction of the federal courts must always appear in the record.*

The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions. In this case the jurisdiction is claimed on account of the subject-matter of the action, and not on account of the citizenship of the parties. It was incumbent on the relators, therefore, to show, in their pleadings or otherwise, that this action arose under the revenue laws of the United States. This they failed to do. They do show that they claimed title through such laws, but not that their title in that respect is disputed. For all that appears, Anderson may admit their title, and still contest their right to possession as against him. He may be their tenant, or he may be their grantee. There are no presumptions in favor of the jurisdiction of the courts of the United States. The suit was therefore properly dismissed, and we cannot compel the circuit court to take jurisdiction.

Petition dismissed.

CARTER v. BENNETT.

(15 Howard, 354-357. 1853.)

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.—This case comes before us upon a writ of error directed to the supreme court of the state of Florida, and a motion has been made to dismiss it for want of jurisdiction. The suit was brought by Bennett, the defendant in error, against Carter, the plaintiff in error, in December, 1842, while Florida was yet a territory, and was continued from term to term, until she was admitted into the Union as a state. 5 Stats. at Large, 742. The action was trover for certain property. The declaration was in the usual form, and the defendant pleaded the general issue of not guilty. After Florida became a state, and the territorial court, in which the suit was pending, ceased to exist, the papers were transmitted by the clerk to the circuit court of the state for the same county. The plaintiff and defendant both appeared in the circuit court, and the case was continued until December, 1848, when the parties proceeded to trial—and the jury found for the defendant in error, and assessed his damages at \$19,999.66.

Several exceptions were taken to the rulings of the court on the trial, which it is not necessary to mention, because they relate to the laws of the state, over which this court can exercise no jurisdiction upon this writ of error. After the verdict was rendered against him, the plaintiff in error moved for a new trial. But the motion was overruled by the court. He thereupon offered to prove that he was a citizen of Georgia at the time the suit was instituted in the territorial court, and had continued to be so, and still was a citizen of that state. And this fact being admitted by the opposite party, he moved in arrest of judgment, and that the case be dismissed from the court, with an order to the clerk to transfer the papers to the district court of the United States for the northern district of Florida, or hold the papers and proceedings subject to any order of transfer or demand from the said court. This motion was refused, and judgment entered on the verdict. Whereupon he appealed to the supreme court of the state, and the judgment of the circuit court being there affirmed, he has brought the case before this court by writ of error.

In support of this writ, the plaintiff in error contends that as he was a citizen of Georgia at the time the suit was brought in the territorial court, and

also when the act of congress of February 22, 1847 (9 Stats. at Large, 128), was passed, the suit was, by operation of that law, transferred to the district court of the United States for the northern district of Florida, and that the circuit court of the state had no right to take possession of the papers in the case, nor any authority to try and decide it; and that, by moving in arrest of judgment upon this ground, he had claimed a right under a law of the United States; and that, as the decision was against the right claimed, he is entitled to a writ of error under the twenty-fifth section of the act of 1789. 1 Stats. at Large, 85.

§ 170. *To give the supreme court jurisdiction over the judgment of a state court, the record must show that the right claimed by appellant was necessarily decided in the judgment.*

Upon this motion to dismiss the writ of error, the construction of the act of congress of 1847 is not before us. In this stage of the case we are not called on to decide whether this act of congress did or did not, *proprio vigore*, transfer the case to the district court of the United States. The only question presented by the motion is whether, upon the record before us, we have a right to reverse the judgment of the state court. And in order to give this court jurisdiction over the judgment of the state court, it must appear by the record that the right now claimed by the plaintiff in error, to remove the case to the district court of the United States, was so drawn in question in the state court that it must have been decided in the judgment it has given.

§ 171. *Upon a motion in arrest of judgment the court cannot look behind the record.*

Now, there is nothing in the pleadings to show that Carter was a citizen of Georgia. It is not so stated in the declaration or plea. And when the papers were transmitted to the state court, he appeared there, and defended himself upon the plea of the general issue, which he had put in in the territorial court. This plea admitted the jurisdiction of the court; and the case was tried, and the verdict rendered upon these pleadings. And upon a motion in arrest of judgment, the court cannot look beyond the record; and the judgment cannot be arrested, unless there is some error in law or defect of jurisdiction apparent in the proceedings. And here there was no error or defect of jurisdiction apparent on the record, even if the construction of the act of 1847, contended for by the plaintiff in error, is the true one. Both parties, by their pleadings, admitted the jurisdiction of the court, and there was no averment in any part of them that Carter was a citizen of Georgia. And after a verdict is rendered, the judgment cannot be arrested by the introduction of new evidence on a new fact. It may, in a proper case, lay the foundation of a motion for a new trial, but not in arrest of judgment. It is evident, therefore, that the state court, in proceeding to give judgment on the verdict, could not legally have decided upon the validity of the plaintiff's objection to its jurisdiction. They could not hear evidence, in that stage of the case, to prove that Carter was a citizen of Georgia, nor judicially notice it when admitted by the opposite party. And we are bound to presume that they proceeded to judgment on this ground, and did not consider the right claimed by the plaintiff in error as properly before them.

§ 172. *When citizenship of the parties is properly averred, objection to the jurisdiction on this ground may be taken only by plea in abatement.*

In an action in a circuit court of the United States where the jurisdiction depends upon the citizenship of the parties, it has always been held that where the plaintiff avers in his declaration that he and the defendant are citizens of

different states, if the defendant means to deny the fact and the jurisdiction, he must plead it in abatement; and if he omits to plead it in abatement, and pleads in bar to the action, he cannot avail himself of the objection at the trial. Still less could he be permitted to do so upon a motion in arrest of judgment. And the same principles which this court sanction in such cases in the courts of the United States upon questions of jurisdiction depending upon personal privilege, we are bound to apply to the proceedings in the state court. Undoubtedly, it was in the power of the plaintiff in error, when he appeared to the suit in the circuit court of the state, to have pleaded to the jurisdiction upon the ground that he was a citizen of Georgia. Whether such a plea could have been maintained or not, it is not necessary for us to say; but it would have brought before the court the construction of the act of 1847, and it must have been judicially decided. And if the decision had been against the right he claimed under it, this court would have had jurisdiction to hear and determine that question. But upon the record, as it comes before us, it does not appear that this question was ever presented to the state court in a manner that would enable it judicially to notice or decide it. And the writ of error must, therefore, be dismissed for want of jurisdiction.

§ 173. How conferred.—The jurisdiction of the supreme court of the United States is given by the constitution. In order to give perfect jurisdiction to any of the other federal courts, the jurisdiction must have been granted by the constitution to the federal courts, and assigned to the court in question by an act of congress. If either of these two requisites is wanting, the jurisdiction is not valid. *The Mayor v. Cooper*, 6 Wall., 252.

§ 174. Fictitious action.—When two parties, who have no substantial controversy, but who wish to get an opinion upon a matter of law on a question in which their interests are opposed to many others, become plaintiff and defendant in a collusive suit in a federal court, the court will not entertain the suit. *Lord v. Veazie*, 8 How., 254 (ACTIONS, §§ 95-97).

§ 175. By consent—Admitting facts.—Although parties cannot give jurisdiction to the United States courts by consent, yet they can admit facts upon which the jurisdiction depends. When a case was removed from a state court to the circuit court, and afterwards the record being destroyed by fire, the parties asked that the record might be renewed and it was partially so renewed, but there was no mention of facts necessary to give jurisdiction, it was held that the court might presume from the action of parties and the court below that jurisdiction appeared on the record which was destroyed. *Railway Co. v. Ramsey*, 22 Wall., 326.

§ 176. Doubt as to jurisdiction.—If, at any stage in a case, a federal court entertains a doubt whether it has jurisdiction, it should not proceed further in the case until the doubt is settled, even if the parties are willing to submit to the jurisdiction of the court without raising any question. *United States v. New Bedford Bridge*, 1 Woodb. & M., 406.

§ 177. The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue it is too late. *De Sobry v. Nicholson*, * 3 Wall., 420.

§ 178. If new subjects of jurisdiction are added to a court, the former provisions regarding appeals apply to these additions, although the court is one of limited jurisdiction. *In re Zellner*, 9 Wall., 244.

§ 179. When a new state is admitted.—By act of congress, when a new state is admitted to the Union, having formerly been a territory, all cases in the territorial courts, which are of federal character and jurisdiction, are transferred to the district court of the United States, when that court has also circuit court powers. But where the territory is attached to a circuit and has a circuit court sitting in that district, then cases which belong to circuit court jurisdiction are, on the admission of the territory as a state, transferred to the circuit court, and only those which belong to the jurisdiction of the district court are transferred to the district court. *Express Co. v. Kountze*, 8 Wall., 350 (CARRIERS, §§ 1499-1502).

§ 180. Transferred to another tribunal.—Congress have power to transfer the jurisdiction over a suit from one tribunal to another during pendency of the suit. *Stuart v. Laird*, * 1 Cr., 299.

§ 181. Law and equity.—In the federal courts, the jurisdictions of law and chancery are distinctly maintained in Louisiana as well as in other states, although the state courts of Louisiana have no such distinctions. *McCollum v. Eager*, 2 How., 64 (APPEALS, §§ 103, 104).

§§ 182-193. COURTS.—JURISDICTION OF UNITED STATES COURTS.

§ 182. By act of congress of March 8, 1792, ch. 137, the forms of proceedings at common law in the federal courts are to be the same as were then used in each state respectively, but in equity the proceedings are to be such as belong to courts of equity. If a state court declares what is generally supposed to be an equitable right, a legal one, it may be enforced by the federal court either in law or equity. *Mayer v. Foulkrod*, 4 Wash., 355.

§ 183. Chancery jurisdiction—State courts.—A controversy between a *cestui que trust* and his trustee, touching the accounts of the latter for services and disbursements in the management of the trust, belongs peculiarly to a court of chancery, and is therefore within the jurisdiction of the federal courts, when the proper parties are before them and the required sum is in dispute. Nor can they be deprived of this jurisdiction or any portion it, by its absorption through state legislation into any particular state tribunals, or by any attempted transfer of the subjects of litigation from one department of jurisprudence to another. Hence, although the statutes of Connecticut should be construed to give jurisdiction over the settling of the accounts of trustees to the probate court, yet the federal courts, in cases where the *cestui que trusts* are citizens of foreign states, and the trustees citizens of this state, would have concurrent jurisdiction with them; and where a statute requires the trustees to render annual accounts to the probate court, but does not require notice to be given to the *cestui que trusts*, and the probate court accepts and approves an account so rendered, such decision is not binding on the *cestui que trusts*, nor does it bar the jurisdiction of the federal court. *Parsons v. Lyman*, 32 Conn., 566. See §§ 322-328.

§ 184. Parties liable who are not joined.—Jurisdiction of the federal courts is not defeated by the fact that other persons, not parties to the suit, but beyond the jurisdiction of the court, are equally liable with the defendants; but a judgment in such case does not injure or affect the rights of such absent parties. *Inbusch v. Farwell*, 1 Black., 571.

§ 185. Necessary party without the jurisdiction.—The circuit courts of the United States refuse to entertain a suit where a party, whose legal presence in the proceeding is necessary, cannot be subjected to their jurisdiction. *First Nat. Bank of Hannibal v. Smith*, *6 Fed. R., 215.

§ 186. Want of service—Default.—A court has no jurisdiction to render a judgment by default when no proper service has been made on the defendant. *Harris v. Hardeman*, 14 How., 338.

§ 187. Averments.—Unless the proper averments of jurisdiction are made in the pleadings, the federal court cannot entertain jurisdiction even by consent of parties; but where the averments are duly made, their truth will be conclusively admitted by a plea to the merits, and after trial the jurisdiction cannot be inquired into on this ground. *Bobyshall v. Oppenheimer*, *4 Wash., 482.

§ 188. A cause had been removed, after final decree, to the supreme court, which reversed the decree and remanded the cause. It was then discovered to be not within the jurisdiction of the court. *Held*, that as the merits of the cause had been decided in the supreme court, and the mandate required only the execution of its decree, the circuit court was bound to carry it into execution, although the jurisdiction of that court was not alleged in the pleadings. *Skillern v. May*, *6 Cr., 267.

§ 189. Where the record of the district court for the northern district of California, in proceedings to confirm a title, did not show the land to be within that district, the case was remanded on the ground that jurisdiction must appear on the record. *Cervantes v. United States*, *16 How., 619.

§ 190. Where the jurisdiction of a federal court depends upon the amount involved in the controversy, if the pleadings and record do not show that the amount involved is enough to give the court jurisdiction, the case must be dismissed. *Lanning v. Dolph*, 4 Wash., 627.

§ 191. To enforce decree.—When a federal court has jurisdiction of a case, it has jurisdiction to enforce its decree by all proper processes, including imprisonment for debt, if that is allowed by the laws of the state where the court is sitting. *Campbell v. Hadley*, 1 Spr., 472.

§ 192. When a federal court has jurisdiction of the parties to a cause by reason of citizenship, and of the subject-matter of the cause, and renders judgment, it has also power to enforce the judgment by proper forms of execution and other proceedings. *Pollock v. Lawrence Co.*, *2 Pittsb. R., 142.

§ 193. To enforce a lien against property of a state.—Where property passes to a state subject to a specific lien or trust, such lien or trust will be enforced whenever the property comes under the jurisdiction or control of the courts; but where property is not affected by a specific lien or trust, the transfer by the state passes a clear title. Therefore, where a state issued its bonds to assist a railroad company, and received, as security, a trust deed of the land granted to the railroad by congress, and subsequently granted the same land to a railroad company organized as a successor of the first, it was held that the United States court had no jurisdiction to enforce the claim of a bondholder against the land. *Chamberlain v. St. Paul, etc., R. Co.*, 2 Otto, 305.

§ 194. **Enjoining heads of departments.**—The federal courts have no jurisdiction to issue an injunction to the secretary of the treasury forbidding him to perform an act in the scope of his duties which is not purely ministerial in character but involves the exercise of his official discretion. *McElrath v. McIntosh*,* 11 Law Rep., 410.

§ 195. **Canceling a contract—Service.**—Where a suit is brought to cancel a purely personal contract, *e. g.*, a policy of insurance, and no property is within the scope of the suit or the jurisdiction of the court, nor is the defendant personally served, but a substituted service is made on his guardian, in accordance with the provisions of a state statute, the circuit court of the United States has no jurisdiction of the case. *Insurance Co. v. Bangs*, 13 Otto, 438.

§ 196. **Restraining proceedings under a will.**—A federal court has jurisdiction of a bill in equity by a citizen of one state to restrain executors, citizens of another state, from proceeding under the will probated in the latter state. *Amory v. Amory*,* 18 Int. Rev. Rec., 149.

§ 197. **Enjoining collection of taxes.**—A federal court has no jurisdiction to interfere with and stop by injunction the collection of taxes by state officers when the right of the state to tax the property is clear. *It seems* that if the state had no authority to impose the tax the federal court might enjoin its collection. *Carroll v. Perry*, 4 McL., 28.

§ 198. **Condemnation of land.**—Acts of congress may give federal courts authority to proceed to the condemnation of land for public federal purposes; and this may be regulated by congress or by the statutes of the state in which the land is situated. *United States v. Block* 121, 3 Biss., 215.

§ 199. **Land titles.**—The federal courts have no jurisdiction under acts of congress of May 26, 1824, and June 17, 1844, to decide upon complete and perfect legal or equitable titles to land lying in the territory ceded to the United States by France or Spain. *United States v. Philadelphia and New Orleans*, 11 How., 647.

§ 200. The constitution of the United States extends the judicial power of the United States to controversies "between citizens of the same state claiming lands under grants of different states." Under this provision it was held that where suit is brought in a federal court by a township of one state against citizens of the same state for the recovery of lands lying in that state and granted to the plaintiffs by the legislature of that state, the defendants claiming under grant from the adjoining state, while its territory extended over the land in question and before the formation of the state which granted to the plaintiff, this constitutes a case where citizens of the same state claim lands under grants of different states. *Town of Pawlet v. Clark*, 9 Cr., 322.

§ 201. Under the acts of 1824 and 1844, the federal courts have jurisdiction only of cases involving imperfect titles under the Spanish colonies grant. In such cases, the circuit court or the supreme court will take jurisdiction. *United States v. Davenport*, 15 How., 8; *United States v. Roselius*, 15 How., 37.

§ 202. The provisions of the acts of congress of May 26, 1824, and June 17, 1844, allowing French and Spanish titles to land granted by France and Spain to the United States to be asserted in courts of the United States, apply only to incomplete titles. Any complete legal or equitable title is not included in the scope of these acts. *United States v. Reynes*, 9 How., 144.

§ 203. Where the subject-matter of the suit is land, and the title is perfect and does not involve the construction of an act of congress, and no jurisdiction is conferred by the residence of the parties, the federal courts have no jurisdiction. *United States v. D'Auterive*, 15 How., 23.

§ 204. **Over military reservations.**—When a military reservation has always been the property of the United States, though situated in a state, if that state has consented that the federal authorities have exclusive jurisdiction over such reservation, then such authorities have such jurisdiction. *Ex parte Hebard*, 4 Dill., 382.

§ 205. **Over state officials.**—An official appointed by a state, as, for instance, a justice of the peace, is amenable to the jurisdiction of the federal courts, if he wilfully uses his power to imprison one who is summoned as a witness in a federal court, and does this in order to impede and obstruct the court in the administration of justice. *United States v. Kindred*, 4 Hughes, 498 (CRIMES, § 844, 845).

§ 206. **Suits by officers.**—The act of congress, March 3, 1815, section 4, gives the circuit and district courts of the United States jurisdiction of all suits at common law where the United States or any officer thereof, under the authority of any act of congress, shall sue. A receiver of a national bank appointed by the comptroller of the currency, with the concurrence of the secretary of the treasury, in accordance with the provisions of act of June 3, 1864, section 31, is such an officer. *Platt v. Beach*, 2 Ben., 316.

§ 207. **Suits by executors.**—The executor of the will of a person who dies in a foreign country can maintain an action in a federal court by virtue of letters testamentary granted

§§ 208-221. COURTS.—JURISDICTION OF UNITED STATES COURTS.

to him in his own country. All rights to personal property are regulated by the laws of the country in which the testator lived, but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. *Dixon v. Ramsay*, 3 Cr., 323.

§ 208. An Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot sue in the courts of the United States. *Cherokee Nation v. State of Georgia*, 5 Pet., 15.

§ 209. An Indian is a person within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of *habeas corpus* in a federal court or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution and laws of the United States. *United States v. Crook*, 5 Dill., 468.

§ 210. Suits by foreign governments.—The federal courts have jurisdiction of suits by foreign governments. *King of Spain v. Oliver*,* 2 Wash., 429.

§ 211. Whether a king who has not been recognized by the government may be permitted to sue in the federal courts is a question not proper to be decided on motion. *Ibid.*

§ 212. Foreign ship of war.—A ship of war belonging to a nation in amity with the United States, and allowed by them to enter their harbors, is not, while within their territorial jurisdiction, subject to arrest on any civil cause of action, at the suit of an individual. *The Pizarro*,* 10 N. Y. Leg. Obs., 99.

§ 213. Release of foreign negro seamen.—A federal court has no right to issue a *habeas corpus* writ to release a negro seized under the act of South Carolina, relative to foreign negro seamen coming into that state; but if the sheriff who seizes the negro sells him, the federal court may issue a writ *de homine replegiando* against the vendee of the sheriff. *Elkison v. Deliesseline*,* 2 Wheel. Cr. Cas., 73.

§ 214. Deprivation of rights—Fourteenth amendment.—A state law compelling negro children to attend different schools from white children does not deprive the negroes of any rights, and therefore, not raising a question under the fourteenth amendment to the federal constitution, a federal court has no jurisdiction of a case involving that point. *Bertonneau v. Directors of City Schools*, 3 Woods, 181.

§ 215. Captured and abandoned property.—Land belonging to the Confederate government and seized by the United States government, and by it sold, cannot be made the subject of proceedings in the United States circuit court under the captured and abandoned property act. If proceedings are begun in that court they should be dismissed. *United States v. Huckabee*, 16 Wall., 435.

§ 216. Seizure under revenue laws.—The federal courts have exclusive jurisdiction in all cases of seizure under the United States revenue laws. *Gelston v. Hoyt*, 3 Wheat., 312.

§ 217. Proceedings in rem.—In order to have jurisdiction in proceedings *in rem*, the thing must be actually or constructively in the possession of the court. When property is seized by revenue officers for condemnation, and proceedings instituted in a federal court, if the seized property is abandoned before the decree and restored to the owners, the court loses jurisdiction. *The Brig Ann*, 9 Cr., 290.

§ 218. Summary remedy in favor of bank.—The circuit court of the District of Columbia has jurisdiction to enforce the summary remedy given in favor of the Bank of Columbia by act of Maryland, 1793, ch. 30. *Bank of Columbia v. Okely*, 4 Wheat., 245 (CONST., §§ 2522-25).

§ 219. No remedy in state courts.—By act of congress (April 9, 1866, sec. 8), jurisdiction is given to the United States district and circuit courts, concurrently, of all causes, civil or criminal, affecting persons who cannot enforce in the state courts their civil rights under the other sections of the act. Under this act it was held that when two whites were indicted in the circuit court of the United States, for killing a black woman, and it was alleged in the indictment that the killing was done in the presence of three negroes, who by the state law could not be witnesses in a state court, these facts did not give the circuit court jurisdiction, since the cause "affected" only the government and the criminal, not the witnesses. *Blyew v. United States*, 13 Wall., 590 (CONST., §§ 975-981).

§ 220. Mandamus.—The circuit court of the United States has power to issue a writ of *mandamus* only when necessary to the exercise of its jurisdiction. Its jurisdiction is, by the judiciary act of 1789, limited to suits of a civil nature at common law or in equity. A *mandamus* to compel county officers to assess and collect a tax to pay the interest of bonds issued by the county to support a railroad is not a suit at law or in equity, within the meaning of the judiciary act, and the court has no authority to issue it; nor is jurisdiction conferred by the fact that by the law of the state a *mandamus* is a civil action. *Bath County v. Amy*, 13 Wall., 247.

§ 221. Sufficient title.—In an ejectment suit, where the lessor of the plaintiff, a citizen of New York, had an equitable title, as tenant in common, to one hundred and sixty-five out of two thousand five hundred shares of an entire tract of land in Pennsylvania, vested in trust-

ees in the latter state, for the benefit of the company of which he was a member, which trustees had conveyed to him the lands in suit by a lease for six years, by which he covenanted to pay an annual rent, and to bring suits to recover the said land, and at the end of the term to deliver the same up to the trustees, it was held that the title was sufficient to give jurisdiction to the circuit court of the United States. *Browne v. Browne*,* 1 Wash., 429.

§ 222. **Suit on appeal bond.**—The federal courts have unquestioned jurisdiction to enforce against a surety the penalty of an appeal bond given on appeal from the judgment of a lower state court to the supreme court of the state, if the citizenship of the parties is such as to confer jurisdiction. *Goshorn v. Alexander*, 2 Bond, 162.

§ 223. **No grant of judicial power.**—Under the treaty with Spain of 1819, and subsequent acts of congress, the district judge of the United States for the district of Florida was made a tribunal for arbitrating certain claims. This is not a grant of judicial power and cannot give a right of appeal to the supreme court. *United States v. Ferreira*, 13 How., 46 (APPEALS, §§ 203, 204).

§ 224. **If the secretary of war appoint commissioners to decide upon claims in a military district, although these officers have no judicial power, yet if a claimant voluntarily submits to their jurisdiction, and accepts their award and receives payment, such claimant will be estopped from presenting his claim before a court of law.** *United States v. Adams*, 7 Wall., 463.

§ 225. **Under treaties.**—No imperfect titles acquired by virtue of the treaty with France can be adjudicated upon by the state courts. Only the federal courts have authority to settle these titles. *Burgess v. Gray*, 16 How., 62.

§ 226. **Want of—Costs.**—If a court decides that it has no jurisdiction of a case, it has no power to make an order relating to costs in the case. It should order the case to be struck from the docket. *The Mayor v. Cooper*, 6 Wall., 250.

§ 227. **Where a case is dismissed for want of jurisdiction on the face of the pleadings, the general rule is that costs will not be allowed in the supreme court.** *Hornthall v. The Collector*,* 9 Wall., 560.

2. *Conflicting and Concurrent Jurisdiction.*

SUMMARY—*Property held by federal court not to be replevied by state courts, § 228.—No interference between state and federal courts, § 229.—Enjoining a sale on execution, § 230.—Property held by state court under a forthcoming bond, § 231.—Trespass against a marshal in a state court, § 232.—Similar but not identical suits, §§ 233-235.—Control over a suit after final decree, § 236.—Objection to jurisdiction, when to be taken, § 237. What is custody of a court, § 238.—Jurisdiction depending upon possession, § 239.—Insolvent estate in process of administration, §§ 240-243.—Attachment of subject-matter, § 244.—Judgment not attachable, § 245.—Proceeds of execution not attachable, § 246.—Concurrent jurisdiction in bankruptcy, § 247.—Concurrent jurisdiction of state and federal courts, § 248.—Concurrent jurisdiction with probate court in administration of trusts, §§ 249, 250.—Concurrent jurisdiction conferred by congress on state courts, §§ 251, 252.—No concurrent jurisdiction in habeas corpus, §§ 253, 254.*

§ 228. **Property in possession of a marshal by virtue of process issuing from a federal court cannot be taken from him by a sheriff under a replevin writ issuing from a state court.** (Discussed and modified in following cases.) *Freeman v. Howe*, §§ 255-260.

§ 229. **A state court cannot impede nor arrest any action a federal court may take within its jurisdiction.** *Amy v. The Supervisors*, §§ 261, 262.

§ 230. **Federal courts have no power to enjoin a sale by a sheriff on an execution issuing from a state court.** *Ruggles v. Simonton*, §§ 263-265.

§ 231. **Property seized under a writ of replevin from a state court and delivered to the defendant on a forthcoming bond is not, pending the suit, subject to seizure under process from the federal court.** *United States v. Dantzler*, §§ 266-69.

§ 232. **The federal court has no power to enjoin the prosecution of an action of trespass in a state court against a marshal for wrongfully seizing the goods of the plaintiff under an execution; and such an injunction, if issued, is wholly void.** *Evans v. Pack*, §§ 270-273.

§ 233. **The pendency of a suit in a state court to determine the priorities of the lien creditors of a corporation, and to obtain a receiver to distribute the revenues of the corporation accordingly, does not bar the jurisdiction of the federal court in a suit subsequently brought in a federal court by one of the lien creditors, who sought a foreclosure and sale by the trustees, alleging a breach of trust, though the complainant was, through the trustees, a party in the suit in the state court.** *Stewart v. Ches. & Ohio Canal Co.*, §§ 274-276.

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§ 234. While a federal court cannot stay the proceedings in a state court, it may take jurisdiction of an action growing out of the same subject-matter, though the effect may be to modify the result in the state court. *Harrison Wire Co. v. Wheeler*, §§ 277-279.

§ 235. A suit in a federal court to subject property to all the liens resting upon it is not barred by the pendency of a suit in a state court, involving the same property but only seeking to settle the priorities of two of the lien creditors. *Hay v. Railroad Co.*, §§ 280-283.

§ 236. The control of a federal court over its judgments remains during the term at which they are rendered, and, after dismissing a cause, it may at any time during the term resume jurisdiction, even though the jurisdiction of a state court has been invoked in the mean time. *Union Trust Co. v. Railroad Co.*, §§ 284-287.

§ 237. After the trial of a replevin suit in a federal court and a verdict on the merits, it is too late to object to the jurisdiction on the ground that a state court had possession of the property in question. *Gilman v. Perkins*, §§ 288, 289.

§ 238. Property is in possession of a state court and exempt from process of a federal court when the custody of the keeper is such that he may at any time assert his possessory rights and prevent the property from being withdrawn. *Lewis v. The Ship Orpheus*, §§ 290-294.

§ 239. By the filing of a bill asking the appointment of a receiver for trust property, the service of process, and the issuance of a restraining order, the federal court acquired a constructive possession of the property, and possession taken of it by a receiver, appointed by a state court in a suit subsequently begun, would be in contempt of the federal court. (Per Woods, Circuit Judge.) *Contra*: The rule as to priority does not apply where the objects of the two suits are different. Jurisdiction then depends upon the possession of the property, which is only to be acquired by seizure. (Per Bradley, Circuit Justice.) *Wilmer v. Railway Co.*, §§ 295-303.

§ 240. Where the property of an insolvent is in process of administration by a state court, the federal court may proceed to a determination of the rights of parties therein, though no execution will issue. *Black v. Scott*, §§ 304-306.

§ 241. This exemption, however, does not apply to such of the property as is set apart and covered by a specific lien. *Ibid.*

§ 242. Though a decree of the state court has vested in a state officer the entire property of an insolvent company, yet this will not abate a suit in ejectment subsequently begun in a federal court against the officer and a tenant of the company, who had attorned to him, to recover possession of land of the plaintiff on which the company had erected a building without permission, and leased it to the tenant. *Walker v. Flint*, §§ 307-309.

§ 243. Proceedings by assignees in a state court in conformance with a statute do not bar a suit in the federal court to establish a claim of a non-resident upon assets in the hands of the assignees. *Shelby v. Bacon*, §§ 310-312.

§ 244. A suit on a promissory note in a federal court is not affected by the subsequent institution of a suit in attachment, and the summoning of defendant as garnishee, in a state court. *Campbell v. Emerson*, § 313.

§ 245. A judgment rendered by a federal court cannot be attached by process of a state court against the plaintiff. *Thomas v. Wooldridge*, § 314.

§ 246. Money obtained by a marshal on an execution is in custody of the court, and not subject to attachment in a state court. *Alabama Gold Life Ins. Co. v. Girardy*, § 315.

§ 247. Under the bankrupt act of 1867, before the revision of the statutes, the state and federal courts had concurrent jurisdiction in cases in which a bankrupt or his assignee was a party. *Claffin v. Houseman*, §§ 316-321.

§ 248. Jurisdiction possessed by the state courts under their own constitution may be exercised concurrently with the federal courts, unless expressly excluded by the constitution or laws of the United States. *Ibid.*

§ 249. The statutes of Connecticut do not give exclusive jurisdiction to the probate courts of that state finally to settle all matters coming before them, including the administration of trusts. *Parsons v. Lyman*, §§ 322-328.

§ 250. Should the statutes attempt to confer such power, they could not exclude the concurrent jurisdiction, in matters of trusts, possessed by the circuit court as a court of equity. *Ibid.*

§ 251. Concurrent jurisdiction with the federal courts in criminal cases cannot be conferred upon the state courts by congress, and whether this may be done in civil suits has been variously held. *Stearns v. United States*, §§ 329-331.

§ 252. The exercise of concurrent jurisdiction in civil suits, when conferred by congress upon the state courts, is considered to be optional with the latter; but it is the duty of state judges to support the constitution and laws of the United States. *Ibid.*

§ 253. A state court has no jurisdiction by *habeas corpus* to release a prisoner held by order of a federal court. *Ableman v. Booth*, §§ 332-336.

§ 254. A federal judge cannot grant a writ of *habeas corpus* to one confined, though illegally, by order of a state court, unless the confinement be in violation of the constitution or laws of the United States. *Ex parte Forbes*, §§ 337, 338.

[NOTES.—See §§ 339-448.]

FREEMAN v. HOWE.

(24 Howard, 450-461. 1860.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of Massachusetts. The case was this: Selden F. White, of the state of New Hampshire, in 1856, instituted a suit in the circuit court of the United States for the district of Massachusetts, against the Vermont & Massachusetts Railroad Company, a corporation under the laws of Massachusetts, to recover certain demands claimed against the defendants. The suit was commenced in the usual way by process of attachment and summons. Freeman, the marshal, and plaintiff in error, to whom the processes were delivered, attached a number of railroad cars, which, according to the practice of the court, were seized and held as a security for the satisfaction of the demand in suit in case a judgment was recovered. After the seizure, and while the cars were in the custody of the marshal, they were taken out of his possession by the sheriff of the county of Middlesex, under a writ of replevin in favor of Howe and others, the defendants in error, issued from a state court. The plaintiffs in the replevin suit were mortgagees of the Vermont & Massachusetts Railroad Company, including the cars in question, in trust for the bondholders, to secure the payment of a large sum of money which remained due and unpaid. The defendant, Freeman, in the replevin suit, set up, by way of defense, the authority by which he held the property under the circuit court of the United States, which was overruled by the court below, and judgment rendered for the plaintiffs. The case is now before us on a writ of error.

§ 255. *The course of decision in the supreme court in conflicts of process and authority between federal and state courts.*

I. The suit in this case has been instituted and carried on to judgment in the court below under a misapprehension of the settled course of decision in this court in respect to the case of conflicting processes and authorities between the federal and state courts, and also in respect to the appropriate remedy or the plaintiffs for the grievances complained of. As it respects the effect to be given to the processes of the courts, whether state or federal, the subject was so fully and satisfactorily examined in the case of *Taylor v. Carryl*, the last of the series on the subject, we need only refer to it, as all the previous cases will there be found. 20 How., 583. The main point there decided was, that the property seized by the sheriff, under the process of attachment from the state court, and while in the custody of the officer, could not be seized or taken from him by a process from the district court of the United States, and that the attempt to seize it by the marshal, by a notice or otherwise, was a nullity, and gave the court no jurisdiction over it, inasmuch as to give jurisdiction to the district court in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process.

§ 256. *Misapprehension of the real decision in Taylor v. Carryl.*

In order to avoid the effect of this case it has been assumed that the question was not one of conflict between the state and federal authorities, but a ques-

tion merely upon the relative powers of a court of admiralty and a court of common law in the case of an admitted maritime lien. But no such question was discussed by Mr. Justice Campbell, who delivered the opinion of the majority of the court, except to show that the process of the district court in admiralty was entitled to no precedence over the process of any other court, dealing with property that was, in common, subject to the jurisdiction of each. On the contrary, he observed, at the close of the opinion, that the view taken of the case rendered it unnecessary "to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them." The minority of the court took a different view of the question supposed to be involved in the case. It is succinctly stated by the chief justice at the commencement of his dissenting opinion. He observes: "The opinion of the court treats this controversy as a conflict between the jurisdiction and rights of a state court and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their own officers within the sphere of their acknowledged powers. In my judgment, this is a mistaken view of the question presented by the record. It is not a question between the relative powers of a state and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in a case of an admitted maritime lien;" and hence the conclusion was arrived at, that the power of the admiralty was paramount. The majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a state and federal process, and in order to avoid unseemly collision between them, the question as to which authority should, for the time, prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.

§ 257. *The custody of the officer over property in a proceeding in rem not essentially different from that in case of a common law attachment.*

Another distinction is attempted by the defendants in error. It is admitted that in the case of a proceeding *in rem*, the property seized and in the custody of the officer is protected from any interference by state process. But it is claimed that the process of attachment issued by a common law court stands upon a different footing, and the reasons assigned for the distinction are, that in the one case the property seized is the subject of legal inquiry in the court, the matter to be tried and adjudicated upon, and which, in the language of the counsel, lies at the foundation of the jurisdiction of the court; but that, in the other, the property seized, namely, under the attachment, is not the subject-matter to be tried, like the property which is the subject of a libel *in rem*, as the process is, simply, for the recovery of a debt, without any lien or charge upon the property, except that resulting from the attachment to secure the debt, and that the question of lien upon the property is a collateral one, which the federal court could not hear and decide in the action before it; and further, that the question of liability of the railroad company was upon certain bonds, the trial and judgment upon which would not be affected by the possession or want of possession of the property seized by the marshal.

The idea which seems to prevail in the mind of the learned counsel on the part of the defendant in error is, that there is something peculiar and extraordinary in a proceeding *in rem* in admiralty, and in the lien upon which it is

founded, that invests them with a power far above the proceedings or liens at common law, or by statute; and that while the seizure of the property in the one case by the marshal protects it from all interference by state process, in the other no such protection exists.

The court is not aware of any such distinction. In the case of a proceeding *in rem* in admiralty, the lien or charge which gives the right to seize the property results from the principles of the maritime law. In the proceeding by attachment in a court of common law, the lien results from statute or common law; and in both cases, unless the party instituting the proceedings sustains his demand to secure which the lien is claimed, the property is discharged. In both the property is held contingently, dependent upon the result of the litigation. In the admiralty, in the case of collision, upon a bill of lading, or charter-party, for salvage, etc., etc., the main questions litigated are not the questions of lien, but fault or not in the collision, the fulfillment or not of the contract in the bill of lading, or charter-party, or the right to salvage.

The same observations are alike applicable to all cases of attachment in courts of common law, where the lien is given by statute. It is true in a proceeding *in rem*, any person claiming an interest in the property paramount to that of the libellant may intervene by way of defense for the protection of his interest; but the same is equally true in the case of a proceeding by attachment in a court of common law, as will be shown in another branch of this opinion. Some stress has also been placed upon the idea that the forcible dispossession of the marshal of the property under the attachment would not affect the jurisdiction of the court, or interrupt the proceedings in the suit; but the same is equally true as respects the proceedings *in rem* in the admiralty. The forcible dispossession of the marshal of the property once seized would not affect the jurisdiction, or prevent a decree in the case.

§ 258. *Property in possession of a federal court cannot be taken by a state court on the ground that the former had not rightfully taken possession of it.*

Another and main ground relied on by the defendants in error is, that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the federal process, and which it belongs to the federal not the state courts to determine. This is now admitted; for though a point is made in the brief by the counsel for the defendant in error, that this court had no jurisdiction of the case, it was given up on the argument. And in the condition of the present case more than this is involved; for the property having been seized under the process of attachment, and in the custody of the marshal, and the right to hold it being a question belonging to the federal court, under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the state court to interfere with it. We agree with Mr. Justice Grier, in *Peck v. Jenness*, 7 How., 624-5: "It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." "Neither can one take the property from the custody of the other by

replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice."

§ 259. *Discussion of apparently contrary authorities.*

The case of *Slocum v. Mayberry*, 2 Wheat., 2, has been referred to as holding a different doctrine from that maintained by the plaintiff in error in the present case. We have examined the case attentively, and are satisfied that this is a misapprehension. There was no interference there with goods seized under the process of a federal court, and in the custody of the marshal, nor any attempt to draw questions involved in a suit instituted in a federal court into a state court for decision. It is quite apparent from the opinion of the court, if this had been the question before it, what would have been its decision. Chief Justice Marshall observed: "Any intervention of a state authority, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would, unquestionably, be a violation of the act; and the federal court having cognizance of the seizure, might enforce a redelivery of the thing by attachment or other summary process against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officers, or of the court having cognizance of the cause." The reason why the replevin of the cargo in the state court was maintained was, that the vessel only was seized by the officer, and not the cargo, and the latter was not, therefore, within the protection of the principle announced.

Reference was made, also, on the argument in the present case, to an opinion expressed by Chancellor Kent, in his *Commentaries* (vol. 1, p. 410), as follows: "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A., should seize the person or property of B., then the state courts have jurisdiction to protect the person and the property so illegally invaded."

The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the federal courts, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the federal court to that of the state the decision of the question in the example given; for it is quite clear, upon the principle stated, the jurisdiction of the former, and the validity and effect of its process, would not be what the federal, but state, court might determine. No doubt, if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after into the state courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final, process of the person in both civil and

criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the state court, and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark, that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. But we shall not pursue this branch of the case further. We regard the question as settled, at least as early as 5 Cranch, 115, *United States v. Peters*, familiarly known as the *Olmstead* case, and which is historical, that it belongs to the federal courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most careful and deliberate consideration, in the opinion of the present chief justice, in the case of the *United States v. Booth*, 21 How., 506.

§ 260. *A bill may be filed in the federal court to regulate judgments at law in the same court without reference to citizenship of the parties.*

II. Another misapprehension under which the counsel for the defendant in error labors, and in which the court below fell, was in respect to the appropriate remedy of the plaintiffs in the replevin suit for the grievance complained of. It was supposed that they were utterly remediless in the federal courts, inasmuch as both parties were citizens of Massachusetts. But those familiar with the practice of the federal courts have found no difficulty in applying a remedy, and one much more effectual than the replevin, and more consistent with the order and harmony of judicial proceedings, as may be seen by reference to the following cases: *Pennock v. Coe*, 23 How., 117; *Gue v. The Tide Water Canal Co.*, 24 How., 257; 12 Peters, 164; 8 id., 1; 5 Cranch, 288. The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.

The case in 8 Peters, 1, which was among the first that came before the court, deserves, perhaps, a word of explanation. It would seem from a remark in the opinion, that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law. In the case of *Pennock v. Coe*, the bill was filed by the mortgagee of the railroad company, in trust for the bondholders, answering to the position of the plaintiffs in the replevin suit in the case before us. *Gue v. The Tide Water Canal Company*, decided at this term, is an instructive case upon this subject, in which the chief justice suggests the difficulties of a court of law dealing with this description of property with a proper regard to the rights of all concerned. In that case the bill was filed on the equity side of the circuit court of the United States for the district of Maryland, to restrain a sale of the defendant's property on execution. *Gue*, the judgment creditor, was a resident of Pennsylvania.

We shall not look into the questions raised upon the mortgage, whether executed by the proper authority, or if it was, whether it covered after-acquired property, as not material to the case before us. The latter question was fully examined in this court in the case above referred to of *Pennock v. Coe*.

Neither shall we inquire into the questions raised under the attachment laws of Massachusetts, as they are unimportant in our view of the case. Upon the whole, after the fullest consideration of the case, and utmost respect for the learning and ability of the court below, we are constrained to differ from it and reverse the judgment.

AMY *v.* THE SUPERVISORS.

(11 Wallace, 136-139. 1870.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Iowa. The plaintiff in error was the plaintiff in the court below. The declaration contains two counts. The first count alleges substantially that the plaintiff recovered a judgment against the county of Des Moines in the said circuit court; that afterwards such proceedings were had that a peremptory writ of *mandamus* was issued from that court and duly served upon the defendants as supervisors of said county, whereby they were commanded to levy a tax sufficient to pay the judgment and costs; that in September, 1868, it was their duty to levy such a tax, and that they neglected to do so, whereby the plaintiff sustained damage to the amount of \$12,108.03. The second count sets forth substantially the same facts; and, further, the provisions of the code of Iowa prescribing the duty of the defendants, as supervisors, under such circumstances, and declaring that a failure on their part to perform the duty enjoined should render them personally responsible for the debt. It is further averred in this count that the judgment is in full force and unsatisfied, and that the defendants have levied no tax and made no provision for its payment, and that the plaintiff is thereby damaged in the sum stated in the first count.

The defendants, by their answer, set up three defenses: (1) *Nil debet*. (2) That the district court of Des Moines county had enjoined them from levying a tax to pay the judgment; that they were nevertheless proceeding to levy such tax when they were attached by order of that court for contempt of its process, and compelled to give bonds to answer said charge of contempt and to obey the injunction, and that those bonds were still in force and obligatory upon them. (3) That before the peremptory writ of *mandamus* was issued the legislature of Iowa repealed the statutory provision, whereby they were made individually liable for the delinquency charged against them, and that, by reason of such repeal, they are not so liable.

The plaintiff demurred to the answer. The court overruled the demurrer and gave judgment for the defendants. The counsel for the plaintiff in error has filed an able and elaborate brief. None has been submitted in behalf of the defendants. A few remarks will be sufficient to dispose of the case.

§ 261. *State court cannot nullify an order of a federal court.*

The circuit court had authority to issue the writ of *mandamus*. It was the process resorted to by the plaintiff to procure satisfaction of his judgment. The state court was powerless to prevent its execution. In so far as concerned the process in question the injunction was a nullity. In such cases the two sets of tribunals — state and national — are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. Where either is in possession of the *res* sought to be reached, the process

of the other must pause until that possession has terminated. But this rule has no application in the case before us. These principles are a part of the checks and balances of our dual and combined polity, and are indispensable to the harmonious and beneficial working of the system. If the ground assumed by the state court in this case can be maintained, the constitution of the United States, and the laws made in pursuance thereof, as regards their judicial administration, instead of being the supreme law of the land, would be subordinated to the authority of the courts of every state in the Union. If this writ may be paralyzed by the injunction relied upon, a writ of *fiery facias* and a writ of *levary facias* may be defeated in the same way. In point of principle there is no distinction between them. Every judgment of a court of the United States may thus be rendered fruitless of any beneficial result. These views are conclusively maintained by *Riggs v. Johnson County*, 6 Wall., 166, and the principle involved has since been reaffirmed in the cases which followed, and were controlled by that judgment.

§ 262. *The liability of a public officer when the law requires absolutely a ministerial act to be done.*

It is not necessary to consider the effect of the repeal of the provision of the code which enacted that the delinquent parties shall be personally liable. There is a common law liability which was not affected by the repeal. The statute was only cumulative on the subject. The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender. The question of the rule by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject. The defenses set up in the answer of the defendants are clearly bad. The demurrer should have been sustained.

The judgment of the circuit court is reversed, and the cause will be remanded with instructions to that court to proceed in conformity to this opinion.

RUGGLES v. SIMONTON.

(Circuit Court for Wisconsin: 3 Bissell, 325-331. 1872.)

STATEMENT OF FACTS.—Proceeding in equity by the complainants, mortgagees of the real and personal property of the Southern Minnesota Railroad Co., to restrain the defendant, the sheriff of La Crosse county, Wisconsin, from selling certain cars, etc., of said company, under execution issued upon a judgment obtained against it in the state circuit court by the other defendants herein. An *ex parte* order was made on the filing of the bill. There was a demurrer to the bill for want of jurisdiction, and a motion to set the order aside.

Opinion by HOPKINS, J.

The motion of the defendants to set aside said order has been very elaborately argued by the learned counsel for the respective parties, embracing a full discussion of all the main questions presented in the bill. The conclusions arrived at obviate an extended notice of all the questions discussed. The counsel for the complainant relied upon the case of *Pennock v. Coe*, 23 How., 117, as analogous, and as sustaining the right of the complainants to the relief sought. That case presents very much the same questions as this, except that in that

case the property had been levied upon by the marshal of that court, and by virtue of its process, instead of by the sheriff of a state court, which the defendants' counsel insists distinguishes it from this case, and renders it inapplicable, and not authoritative upon the leading point raised by him here.

If this court has the right, within the legitimate exercise of its jurisdiction, to restrain the sale of property in the possession of a sheriff, under execution from a state court, to the same extent as it has to restrain the marshal from selling under process from this court, then I think that case decisive of this. It holds that a mortgage is valid upon after-acquired property; that such mortgage takes effect upon such property when put upon the road; that a bill in equity to restrain the sale of a portion of the mortgaged property is a proper remedy by trustees under such a mortgage, and also that a remedy at law in such a case is not adequate.

§ 263. *Federal courts have no authority to restrain a sale by a sheriff under process issued by a state court.*

But conceding all these questions relating to the merits of the case to have been decided in that case in favor of the complainants, the important question raised in this, as to whether this court has the right to enjoin the sheriff of the state court from selling property held by him upon an execution issued out of the state court, was not, in that case, presented nor decided, and its solution depends upon different principles than those passed upon in that case. Replevin would not lie in this court to take the property in controversy out of the possession of the sheriff. *Freeman v. Howe*, 24 How., 450 (§§ 255-260, *supra*). But it is argued that trespass will lie in this court against the sheriff for illegally taking the property, which is undoubtedly the case, and that a bill in equity may be maintained in any case to restrain the tortious act, when trespass will lie where the injury would be irreparable. Such is undoubtedly the general rule, and it is equally true as a general rule that replevin will lie where trespass will; yet the court, in *Freeman v. Howe*, *supra*, hold that replevin would not lie in this court in such a case as this.

In this cause, as in replevin, the question of the conflict of jurisdiction between the state and federal courts is presented. The officer of the state court has the possession under the process of the state court, and is required to execute it by a sale, and is amenable to the state courts for its non-execution. His possession is deemed the possession of that court—a court of concurrent jurisdiction with this, and whose jurisdiction first attached by the seizure of the property upon its process. But it is said that the process only authorized him to take the property of the railroad company, and that he had no authority from the court or its process to take complainants' property, which is true; but that involves the right to hold the property under the process until the question of the right is determined, which can alone be decided by the state court, without producing an extremely hazardous conflict of jurisdiction in the administration of justice. *Taylor v. Carryl*, 20 How., 583.

§ 264. *Authorities reviewed.*

It is said in *Peck v. Jenness*, 7 How., 625, "that neither (state nor federal) court can take the property from the custody of the other by replevin or any other process;" and in *Freeman v. Howe*, *supra*, that "in order to avoid unseemly collisions between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, but which jurisdiction had first attached by the seizure and custody of the property under its process;" and in *Hagan v. Lucas*, 10 Pet.,

400, the court say: "Property once levied upon remains in the custody of the law." The principle deducible from these cases is that a seizure or manual occupation by an officer of a state court, by virtue of the process of a state court, cannot be disturbed by the federal court or its officers, in order to try the rightfulness of the taking or possession. The case of *Buck v. Colbath*, 3 Wall., 335, does not lay down a different doctrine. It simply holds that trespass can be maintained in state courts against a marshal for wrongfully taking the property of a third party upon an execution; that the process does not protect him in such a case, as it only directs him to take the property of the defendant in the writ. That decision is not in conflict with the other decisions of the court herein before referred to, as in such an action there is no interference with the possession of the property attached, and in that case it is remarked that the principle of non-interference with the possession of an officer of another court "is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction."

"That whenever property has been seized by an officer of the court by virtue of its process the property is to be considered as in the custody of the court and under its control for the time being, and no other court has a right to interfere with that possession except a court of supervisory authority."

Such being the settled doctrine of the federal courts, upon what principle can it be maintained that they can interfere by injunction with the execution of the process of state courts. An injunction restraining the sale is an interference with the possession, and is the assertion of a right of control over the property in the custody of another and independent court of concurrent jurisdiction, as derogatory to its dignity and authority as a manual taking would be. While property remains in the custody of a court, taken by virtue of its process, that court must have the exclusive control of it, especially as against a court of another jurisdiction. This is absolutely essential to the harmonious exercise of our intricate system of state and federal jurisprudence. If this court can interfere by injunction to restrain the execution of the process of the state courts, the state courts can retaliate and enjoin parties from proceeding in this court, and in that way defeat absolutely the right of suitors to proceed in any court. Such a state of things would be intolerable, and to avoid such conflict the federal and state courts should refrain altogether from interfering with the possession of property in the custody of the other, and from all attempts to control or investigate the right to hold such possession, as their judgments could not be enforced, if differing from those of the court having the custody, without bringing on the conflict so much to be deprecated.

§ 265. *A sale by a sheriff upon execution is a proceeding in a state court, within the act of congress.*

The act of congress of March 2, 1793 (1 Statutes at Large, 335, section 5), forbids the granting of an injunction to stay proceedings in a state court. This, as construed in *Diggs v. Wolcott*, 4 Cranch, 179; *Watson v. Jones*, 13 Wall., 679, and *Peck v. Jenness*, *supra*, is conclusive against the authority of this court to grant an injunction to stay the sale of the property by the sheriff upon the execution by virtue of which he seized and holds it. A sale by a sheriff upon execution of property seized by him is a "proceeding" in the state court within the meaning and prohibition of the act above mentioned. As this point is fatal to the continuance of the order staying proceedings, the motion of defendant is granted, and the order set aside and vacated. The right of United

States district courts sitting in bankruptcy to stay proceedings in suits against the bankrupt and his property rests upon other grounds which are not necessary to be stated here. This decision may result in the dismissal of the bill upon the defendant's demurrer, unless, under the general prayer for other relief, the court can enter a decree other than of perpetually enjoining the sheriff from selling upon the execution.

UNITED STATES *v.* DANTZLER.

(Circuit Court for Mississippi: 3 Woods, 719-724. 1877.)

STATEMENT OF FACTS.—Certain property had been seized by the sheriff on a writ of replevin from a state court, and after it had been delivered to the claimant upon a forthcoming bond, it was seized by the marshal. A rule was made upon him to show cause why he should not deliver it up.

Opinion by HILL, D. J.

The grounds upon which the rule is based are, that before the seizure was made by the marshal, the state of Mississippi had sued out of the circuit court of the county of Jackson, in this state, a writ of replevin against the said defendant, by virtue of which the same logs and lumber were seized by the sheriff, and that under the provisions of the replevin law of the state, the defendant had executed a forthcoming bond, with sureties conditioned for the forthcoming of said property, to abide the judgment of the court in said suit, and that the property was so in his possession, under said bond, at the time of the seizure by the marshal, under the process from this court.

§ 266. *Where a state court has custody of property by its process, a federal court cannot take it, and vice versa.*

There is no controversy as to the facts stated; the only question being whether or not the property so held by the defendant was subject to seizure by the marshal under the writ of replevin in his hands, the validity of both replevin writs being admitted. It has been a well settled rule, since the foundation of the federal government, that when property is legally in possession of the officers of the state courts, it will not be disturbed by the officers of the federal courts, and that when legally in possession of the officers of the federal courts, it will not be interfered with by officers of the state courts. Any other rule would lead to conflicts, and mar the much desired harmonious action of our complex system of government.

§ 267. *Property delivered to a claimant on his forthcoming bond by an officer is still in the custody of the court.*

The important question to be considered is, whether or not the property, after it was released to the defendant upon his forthcoming bond, was still in the custody of the circuit court of Jackson county. The bond is conditioned that the property shall be forthcoming to abide the judgment of the court, if adjudged to belong to the plaintiff, and if default is made therein, to pay its value and the damages sustained by the plaintiff, and costs of suit. Section 1535 of the code of Mississippi provides that, if the property is in possession of the losing party, the execution shall command the sheriff to take the property in controversy, if the same may be had, and deliver the same to the successful party; and, if not to be had, that he make the value thereof, together with the damages and costs, of the goods, chattels, lands and tenements of the party, and his sureties against whom the judgment is rendered, or the successful party

may have his *distringas* to compel the delivery of the property, together with a *fiery facias* for the damages and costs.

§ 268. *Distinction between possession under a writ of replevin and under a writ of attachment or fiery facias.*

There are several adjudicated cases by the supreme court of this state recognizing the right of a claimant to personal property to institute his action of replevin, and have the property seized and taken out of the possession of a levying officer under writs of attachment or *fiery facias*, though issued out of different state courts. But no case is found where it has been taken out of the possession of an officer holding under a writ of replevin. The reason given for permitting the seizure of the property in the possession of an officer holding under a writ of attachment or *fiery facias* is that the officer levying the process is directed to levy only on the defendant's property, and the writ constitutes the officer the judge of what property belongs to the defendant; and if he seizes property belonging to any one else, his process is no protection to him, and he becomes liable, as a wrong-doer, like any one else. The same doctrine is held by the supreme court of the United States in the case of *Buck v. Colbath*, 3 Wall., 334. In that case, Mr. Justice Miller, in delivering the opinion of the court, draws very clearly the distinction between the two classes of process, and holds that the officer levying the writ of attachment or *fiery facias*, being constituted the judge of what property belongs to the defendant, must act at his own peril, and, if he makes a mistake, must answer for it without the protection of the court from which the process issues; but when he seizes the property specified in his process he is not so liable, and will be protected by the court; he, however, must know that it is specified in the process, for if he makes a mistake and seizes that not specified, he is liable as other persons. In this opinion the case of *Hagan v. Lucas*, 10 Pet., 400, is referred to and approved. In the latter case the facts were substantially these: Hagan obtained judgment against Bynum & McDade, in the federal court for Alabama, upon which execution was issued and levied upon certain slaves in the possession of Lucas, as the property of the defendants. Lucas claimed the property, and gave bond for the trial of his right to the property, as provided by the laws of Alabama. Upon the trial of this issue, it was proved that the same slaves had been levied upon by execution issued upon judgments in the circuit court of Montgomery county, Alabama, in favor of different persons, and Lucas claiming them, gave bond as provided by statute, for their delivery to the sheriff to answer the judgment of the court, should the right be decided adversely as to him upon the trial of the right of property in that court. This case being removed by writ of error to the supreme court, the judgment of the court below was affirmed, the court holding that the slaves, when in the possession of Lucas, under his forthcoming bonds, were not liable to seizure by the marshal, and that his levy was void; holding, further, that when seized by the marshal they were still in the custody of the state court; that the possession of Lucas was the possession of the sheriff, and that property in possession of one court cannot be disturbed by an officer, under process, from another court, and especially by one holding his authority from a different source. The same rule is held in *Taylor v. Carryl*, 20 How., 583, and in *Freeman v. Howe*, 24 How., 450 (§§ 255-260, *supra*); the rule laid down in *Hagan v. Lucas* being referred to and approved in both cases as the settled doctrine of the supreme court on this question.

§ 269. *The position of the United States as plaintiff is not better than that of a citizen.*

The rule thus laid down by the supreme court is binding upon this court, and under it the levy made by the marshal in this case must be held as without authority and void, unless the position taken by the district attorney, and ably and ingeniously pressed, be correct, which is, that admitting the rule as stated, it does not apply to a case where the United States are plaintiffs, in a suit in one of their own courts; that in such case the federal court is not one of concurrent jurisdiction with the state court, but of paramount jurisdiction, and that the United States have a right to resort to their own courts to enforce their rights. That they do possess this right is uncontroverted, but I am of opinion that when the United States bring suit against a citizen for the enforcement of any real or supposed right, they can claim nothing which is not equally the right of the citizen against whom the suit is prosecuted, and that where a state is a party the same rule will be applied.

There is scarcely a conceivable case in which the United States have not ample redress in their own courts for the enforcement of any right, legal or equitable, without interfering with the jurisdiction of the state courts. The writ of replevin provided by the law of this state, was not in force in this court until recently adopted by rule of this court. Before then, the United States were only entitled to an action of trover or trespass, and could not have seized this property until after judgment. These actions are still afforded to the United States, and may be prosecuted without any interference with the state court, or its possession of the property in controversy.

If the person holding the property under such bond, or a purchaser under him, is about to remove the same from the jurisdiction of this court, upon bill filed alleging the right of the United States to the property, the pendency of the suit, and the insolvency of the defendant, an injunction will be granted to prevent the removal of the property beyond the jurisdiction of the court. So soon as the litigation is ended in the state court, the property may be seized if the defendant is successful, or if the plaintiff succeed, it may still be pursued by the writ of replevin, or other remedy. Any risk which the United States may run by reason of not getting immediate possession would not equal the injury that would result from the conflict of jurisdiction to which the doctrine contended for by the district attorney would lead. For it must be remembered that it would authorize the seizure of the property in the possession of the sheriff, as well as any one else.

It must be admitted that there are cases in which the ends of justice would be promoted by allowing property seized under one writ of replevin to be taken out of the possession of the seizing officer by virtue of another writ of replevin, as in case of attachment and *fiери facias*, especially as our act of replevin does not allow third parties, claiming the property, to interfere. To enable this to be done, in one or more states it is allowed by statute; but that it requires an enabling statute to permit it to be done is a strong argument that without it it cannot be done, and none such exists in this state. A very careful consideration of all the arguments and authorities adduced satisfies me that this seizure was unauthorized and void; therefore, the marshal will release the property and deliver it to the defendant, and it is so ordered.

EVANS v. PACK.

(Circuit Court for Michigan: 2 Flippin, 267-274. 1878.)

STATEMENT OF FACTS.—Evans recovered a judgment in this court against Cunningham, Haines & Co., and an execution issued which was levied by the marshal upon certain property claimed by Pack. The property was sold, and Pack sued the marshal and Evans in a state court. Thereupon this bill was filed to enjoin Pack from proceeding in that suit, alleging that the conveyances under which Pack claimed as assignee of Cunningham, Haines & Co. were fraudulent and void. An order restraining Pack and his counsel from proceeding was duly issued, but was disregarded and judgment was obtained by Pack. A motion was made to commit Pack and his counsel for disobeying the order of the court, and another motion to set aside the order referred to.

§ 270. *A state court cannot actually interfere with the possession of goods by a marshal, but may take jurisdiction of an action of trover or trespass against him in respect of the same goods.*

Opinion by BROWN, J.

This case involves the important question whether this court has jurisdiction to enjoin the prosecution of an action in a state court, against the marshal of this court, for taking the goods of one person upon execution against another. That the possession of the marshal of goods seized under an execution cannot lawfully be disturbed by an officer of the state court acting under a writ of replevin or other analogous process was settled in *Freeman v. Howe*, 24 How., 450 (§§ 255-260, *supra*)—a decision since repeatedly affirmed by the supreme court, and universally acquiesced in by the state courts. It is equally well settled that the state courts may entertain jurisdiction of an action of trover or trespass against a marshal, for taking the goods of a third party upon a writ of execution. *Buck v. Colbath*, 3 Wall., 334. The substance of these decisions is that, while the possession of the marshal cannot be disturbed, he enjoys no immunity from prosecution in an action for the value of the goods taken.

§ 271. *Freeman v. Howe and Buck v. Colbath stated and explained.*

It is admitted that under the Revised Statutes, section 720, the judicial power of the federal courts does not extend to the staying of proceedings in a state court, except in cases arising under the bankrupt act. It is claimed, however, that this section has no application to injunction bills which are merely ancillary to suits at law; that every court is bound to protect its officers in the execution of its process; that having first obtained jurisdiction of the case, this court has the right to decide every question arising therein; that the defendants whose property the marshal is alleged to have unlawfully seized might have applied to this court for a release of the same and obtained full protection of their rights; that having elected to sue in the state court, which is admitted to have jurisdiction of such suit, the option still remains with this court to allow the suit to proceed, or interfere by injunction and withdraw it from the cognizance of the state court. Certain expressions in the case of *Freeman v. Howe* seem to support this contention, but these remarks were thrown out by way of *dictum*, and were subsequently criticised in *Buck v. Colbath*, 3 Wall., 334, 344. All that was decided in *Freeman v. Howe* was, that property which had been seized by the marshal on an execution from the federal court could not be replevied by a mortgagee or other claimant through the instrumentality of a state court. In other words, that the marshal was entitled to be protected in his *possession* of the property. The contest related solely to the possession

of the goods seized, and there was no necessity of examining into the question how far another court might go in passing upon the title. The court did not even decide that the state court or the plaintiff therein might be enjoined from prosecuting the suit in replevin, as the case arose upon a writ of error to the supreme court of Massachusetts. It is left to inference, however, that the marshal might lawfully resist by force the execution of any process which was designed to wrest from him the possession of the property.

That nothing more was intended by this decision is evident from the subsequent case of *Buck v. Colbath*, 3 Wall., 334, which was also a writ of error to the supreme court of Minnesota. Colbath sued Buck in one of the courts of Minnesota in an action of trespass for taking goods. Buck pleaded in defense that he was a marshal of the United States, and that, having in his hands a writ of attachment against certain parties, he levied the same upon the goods for the taking of which he was now sued. The court held the action was properly brought. It is true that the marshal in his plea did not aver that the goods belonged to the defendants in the writ of attachment, and relied solely upon the fact that he was marshal, and held the goods under the writ. But the case does not seem to have turned upon Buck's failure to plead that the goods seized in fact belonged to the defendants in the execution. Indeed the court remarks that the case was like that of *Freeman v. Howe* in every particular, with the single exception that, in the earlier case, when the marshal had levied the writ of attachment on certain property, a writ of replevin was issued against him in the state court and the property taken out of his possession, while in the case then under consideration the officer was sued in trespass for the wrongful seizure. The distinction was clearly drawn in the case between actions which involved the possession of the property, and those which simply sound in damages: "Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." Again: "It is only while property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect the possession from the process of other courts." . . . "It is obvious that the action of trespass against the marshal in the case before us does not interfere with the principles thus laid down and limited." Speaking of the liabilities of the marshal under a writ of execution the court further remarks: "He is so liable to the plaintiff, to defendant or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he shall exercise that discretion which the law reposes in him, and in no one else."

§ 272. *The federal court has no power to restrain the prosecution of an action of trespass against a marshal in the state court.*

While the intimation in both these cases is, that the person whose property is wrongfully seized may have redress by petition or bill in equity in this court, it is equally clear he may sue the officer in trespass or trover in the state court, and that such court may lawfully entertain jurisdiction of the suit; and if the state court may take jurisdiction, I know of no authority except in cases arising under the bankrupt act which will justify us in interfering with it. This bill

clearly falls within the language of section 720, and unless there is something peculiar in the nature of this case which exempts it from the operation of this provision, it must be held conclusive. It is said that the bill is ancillary to the jurisdiction of the federal court in the original suit. Perhaps a bill to set aside these conveyances might have been entertained, if filed before the suit was commenced in the state court; but that court having first obtained jurisdiction of the subject-matter, viz., of the alleged fraudulent transfers, with which the original suit in this court had nothing to do, that jurisdiction is exclusive. I have made diligent search for precedents to sustain injunctions against parties proceeding in state courts, but have found none except in cases arising under the bankrupt act, and the courts have seemed to assume that no other exception existed. *Diggs v. Wolcott*, 4 Cranch, 179; *Dial v. Reynolds*, 96 U. S., 340. Had such jurisdiction been supposed to exist, it would certainly have been often invoked.

The restraining order in this case was issued upon the authority of *Kellogg v. Russell*, 11 B. R., 121. In this cause the marshal seized certain property upon a warrant in bankruptcy supposed to belong to the bankrupt, and transferred it to the assignee. A suit having been brought in the state court against the marshal for such seizure by a party who claimed the property, Judge Woodruff entertained a bill against the claimant and the bankrupt to set aside the transfer as fraudulent, and granted an injunction to restrain the further prosecution of the suit commenced in the state court. It is true the learned judge does not base his allowance of the injunction on the ground that the suit was in aid of the bankrupt proceedings, and that it was necessary for the bankrupt court in winding up the estate to have entire control of the assets and the power to determine all collateral questions and controversies arising in connection with the estate, but upon a careful examination of the authorities, I am satisfied that this is the only ground upon which the injunction could be sustained. I cannot accept the case as authority for the general proposition that this court may enjoin the prosecution of an action of trespass against the marshal in all classes of cases.

§ 273. *A restraining order, which is beyond the power of the court to grant, is a nullity, not a mere irregularity.*

But it is urged that, although this restraining order may have been improperly issued, it was still a mere irregularity, that the court had jurisdiction of the case, and that the defendants were bound to obey it until it had been regularly set aside. Had, then, the court jurisdiction of the case? Had it power to take cognizance of, and decide the case according to the law, and carry its sentence into execution? It is not always easy to determine whether the defect in a bill is a jurisdictional one or not, and the authorities are not altogether in harmony. Generally speaking, I should say that, if the complainant states such facts as preclude the possibility of granting the relief sought against the defendant, the court has no jurisdiction of the case; but if the facts stated tend to make a case the court may lawfully proceed to hear and determine it. The distinction is clearly stated in the case of *The Erie Railway Company v. Ramsay*, 45 N. Y., 637, 644. "Did the learned judge who granted that order have jurisdiction? Had he the power to sit in judgment upon the facts presented to him by the verified complaint in this action and the affidavits accompanying it, and to judge whether they brought before him a case demanding the interposition of the provisional remedy of an injunction order?"

"It must be borne in mind that it matters not whether he judged erroneously

as to the necessity or propriety of its interposition, or whether the facts were weak or insufficient. If the allegations contained in the papers before him tended to make a case which, existing, he had the power to enjoin, then he had the power to sit in judgment upon them, and to judge and determine as to their strength or weakness." The statute quoted in this case expressly provides that the court shall not grant an injunction to stay proceedings in a state court. In other words, on no state of facts which the complainant could present would he be entitled to the relief prayed. What, then, can the court be called upon to hear and determine? In the New York case above cited the court held that there was power of injunction to restrain proceedings in another equitable action in the same court, and, therefore, that the justice had the right to judge between the parties and pass upon the subject; in other words, had jurisdiction of the case, and that Ramsay having disobeyed it was guilty at least of a technical contempt. Applying, however, these general principles to the facts in this case, I feel clear that the restraining order was not merely irregularly or improvidently granted, but that it fell within the statute, and was, therefore, void.

In several cases where the question of enjoining the action of the state courts has arisen, the court has used language indicating that it had no jurisdiction of the case. *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 6 How., 112; *Dial v. Reynolds*, 96 U. S., 340. The motion made to commit for contempt must be denied and the restraining order vacated.

STEWART *v.* CHESAPEAKE & OHIO CANAL COMPANY.

(Circuit Court for Maryland: 4 Hughes, 41-47. 1880.)

Opinion by BOND, J.

STATEMENT OF FACTS.—This suit is brought by Daniel K. Stewart, an alien, as a holder of the bonds issued by the defendant company, in his own right, and for the benefit of such others in like interest as may come in and support the suit. The facts alleged and admitted, which are necessary to determine the questions now submitted, are briefly these: The state of Maryland, desiring that a canal should be built from tidewater to Cumberland, in that state, chartered the defendant corporation and became a stockholder in it to the extent of fifty thousand shares, each of the value at par of \$100. This was about five-eighths of the whole capital stock. From time to time, the corporation being unable to complete the canal with the money received from the subscriptions to its stock, the state loaned to it further sums of money, to secure the repayment of which it took mortgages from the defendant company upon all its property, including its tolls and revenues. The assistance thus had from the state's liberality proved insufficient to complete the canal to Cumberland, and the state, being unwilling to assist the corporation further by direct contributions of money, passed the act of 1844, chapter 281, by which the defendant was authorized to mortgage its tolls and revenues to secure another loan from the public generally, for which it was to issue its bonds in an amount not to exceed the sum of \$1,700,000, which was to be used to complete the canal to Cumberland. And by that statute it was enacted that the rights and liens of the state upon the revenues of the defendant should be "waived, deferred and postponed" in favor of the bonds issued under the act of 1844, chapter 281, so as to make such bonds and the interest accruing thereon preferred and absolute liens on the revenues of the defendant company until such bonds, with the interest

thereon, should be fully paid. And the state further authorized the company, by the act referred to, to execute any deed, mortgage, or other instrument of writing deemed necessary or expedient to give the fullest effect to the provisions of the act. Authorized by this act, the defendant company issued the bonds mentioned therein and now in suit, and executed a mortgage upon its revenues and tolls arising from the entire and every part of the canal, to William W. Corcoran, of the District of Columbia, and four others, who having since died, four other citizens of the state of Maryland have been substituted in their places. By said mortgage, in certain contingencies, which the complainant alleges have arisen, the said trustees were to enter and receive possession of the canal, and collect the tolls and revenues thereof and apply them as in said mortgage directed.

The complainant is a holder of the bonds, which, by the act last above referred to, are made preferred and absolute liens on the tolls and revenues of the defendant company, which are due and unpaid. The bill alleges that the complainant has applied to the trustees named in the mortgage above mentioned to proceed under it, and take possession of the tolls and revenues of the defendant, according to its provisions, and that they have refused so to do. It alleges, likewise, misconduct on the part of the defendant, and misappropriation of its tolls and revenues, with which charges, at present, whether true or false, we have nothing to do.

The answer of the defendant, together with other defenses with which we are not now concerned, sets up that there is a suit now pending between the commonwealth of Virginia and the defendant and others, in the circuit court of Baltimore city, which embraces the same subject-matter between the same parties, and files as an exhibit the record of that case.

The mortgagee, Corcoran, by reason of his residence in the District of Columbia, is not made a party to this suit. His four co-trustees under the mortgage have been served with process, and have answered the bill. Under the fifty-second rule in equity, prescribed by the supreme court, the parties to this cause — the facts being as above stated — have, by stipulation of counsel, submitted three questions to the court, which are jurisdictional in their character, the first being: Is the state of Maryland an indispensable party to this suit? the second, Is not William W. Corcoran, one of the trustees, an indispensable party? and the third, Ought not the court to dismiss the bill altogether and refer the parties to the state court, where a suit is alleged to be pending in which the complainant is a defendant, and where, as is claimed, he could have all his rights in this matter properly adjudicated? We will consider these questions in the reverse order to that in which they have been presented.

§ 274. *The pendency of a suit in a state court to settle the priorities of the lien creditors of the defendant will not abate a suit subsequently brought by one of the lien creditors in a federal court to obtain a foreclosure and sale of the property for a breach of trust.*

Upon an examination of the record of the case in the state court, we find that there was a bill filed in 1867 to determine merely the priorities of the various lien creditors who held the obligations of the defendant company. That bill certainly asked for a receiver of the rents, tolls and revenues of the defendant, but it clearly appears that what was intended by that action was to place in the hands of the receiver such surplus tolls and revenues only after they had been collected by the company, to be by him distributed to the parties after the court had determined their respective priorities. These priorities

were ascertained. The real object of that suit was accomplished, and nothing further has been done in it. It would be impossible for the present complainant, though through the trustees of the mortgage he was a party to that bill, to get the relief there which he seeks here. That bill alleges no such grounds for relief as are stated in the bill before us. Here is alleged fraud, misappropriation of the receipts of the defendant company, and gross misconduct of its officers. It would be impossible in the suit in the state court, unless the whole scope and purpose of it were changed, to give the complainant in this cause his remedy there. He could not file a cross-bill, for in that cause, though concluded by the appearance of his trustees, nothing was to be determined but the priority of his lien. He could not ask leave to amend the bill so as to include the subject-matter of the bill here filed, because he is not a party complainant there; and it appears further in this suit that all the alleged wrongs the complainant seeks to have redressed in this action occurred long after the determination of the questions involved in the suit in the state court, and, since further proceedings in it have been neglected or abandoned, the complainant, in our view, is entitled to have his rights adjudicated here. We have no power to send him to another tribunal, because, at a former time, and to determine other rights than those claimed here, he sought the jurisdiction of that forum.

§ 275. *When one of several trustees is not an indispensable party.*

The question next submitted to us is, whether we can proceed in this cause without the presence of William W. Corcoran, who is one of the trustees in the mortgage which the complainant is seeking to enforce. Corcoran cannot be made a party by reason of his residence in the District of Columbia. Four out of five of the trustees named in the mortgage are present in court. They have been brought here by the process of the court, and have answered. Whether or not Corcoran is an indispensable or even a necessary party to the bill depends upon one fact. If the court can determine, by its decree, the rights of these *cestui que trusts* under the mortgage without deciding what the rights of the trustee Corcoran are, then the court is at liberty to proceed. But Corcoran has no interest. He is a mere trustee for the purpose of doing a duty upon a certain contingency. He holds a public trust. He has no title to anything. He has no legal estate in any property. His claim for compensation, even in the event of his being called upon to exercise the trust reposed in him, is a matter not fixed by law, but is altogether within the discretion of a court of equity. The *cestui que trusts* are abundantly represented in this action by a majority of their trustees. If but one of them were in court we should consider that their interests were sufficiently protected against any possible harm from an adverse decree.

§ 276. *A state which has waived its lien by statute in favor of complainant is not a necessary party in a suit for foreclosure.*

The next question submitted is whether the state of Maryland ought not to be made a party. The defendant alleges that the state is an indispensable party. We have seen by the recital of the act of the assembly of Maryland (Statutes 1844, ch. 281), that the state had a mortgage on all the property of the defendant company, together with its tolls and revenues. By that act the state authorized the defendant to borrow more money upon the pledge of its tolls and revenues, and declared that the defendant might pledge the same, and make the debt so incurred a preferred and absolute lien on such tolls and revenues until the same was paid.

This is a suit against the defendant company to enforce the pledge which the

state authorized it to make, and which it did make, with the complainant. It must appear to every one who considers the circumstances under which the waiver of the state lien was made, and these bonds issued, that no one would have taken them if it had been understood that in order to enforce the lien there was a necessity to do what it was impossible to do, namely, make the state a party to the proceedings. Maryland waived its lien. She agreed with the defendant company, not with the bondholders, that it might make such bargain as it could with the bondholders, and that neither she nor her lien should stand in the way of enforcement of the contract against the canal company. Under this authority and agreement — which was by public statute — the defendant contracted with the bondholders. It pledged the revenues and tolls upon which the state had theretofore a prior lien as between the canal, its stockholders and itself. This suit is to compel the defendant company to fulfil the obligation it then entered into. It would be a gross deception on the part of the state to plead that while she waived her lien she never intended to have the mortgage of the tolls enforced. The state does not set up this defense, but the defendant company seeks to shield itself behind it. In our judgment, the state of Maryland, when it authorized the defendant to deal with the public under the act of 1844, chapter 281, and to borrow money by the pledge of its tolls and revenues, waiving its lien, said that to the extent of the loan the state had no interest in the property of defendant. All the state's prior dealings with the defendant were not to be considered. All the rights were waived, sovereignty and all, and were subordinated to the contract of the purchasers of these bonds with the defendant.

The purchasers of the bonds dealt with the canal company, the now defendant, and it ought not to be allowed to set up any interest of the state to defeat the enforcement of its contract. All questions of the distribution of the surplus revenues of the canal company have been conclusively determined by the state court in the action above alluded to, in which the state was a party. The bonds which complainant holds are an undisputed first mortgage debt, having priority over every claim of the state, which lien and priority have been determined by the state courts. If the state has any interest whatever which it thinks is not here properly defended by the defendant, whom she authorized to deal in her behalf with these bondholders, she is at liberty to come here and in this court protect her right. But the defendant is not to be allowed, after making a contract which was authorized by the state, to set up by way of defense against its enforcement, that the state is not made a party, and cannot be without the state's consent, and thus defeat the contract. This complainant did not deal with the state. He dealt with the defendant company. It is against it these complainants seek to enforce their claim, and the defendant having made a contract of its own by the authority of the state, has no right to set up the state's supposed interest to defeat an action to enforce it.

No relief sought by the bill would, by any decree we are asked to pass, conclude any rights of the state of Maryland. We are of opinion that these objections to the complainant's bill must be overruled.

HARRISON WIRE COMPANY *v.* WHEELER.

(Circuit Court for Connecticut: 11 Federal Reporter, 206-209. 1882.)

Opinion by SHIPMAN, D. J.

STATEMENT OF FACTS.— This is a demurrer to a bill in equity. The bill alleges that the plaintiff is the maker of three negotiable promissory notes, payable to

the order of and delivered to E. S. Wheeler & Co., who procured the notes to be discounted before maturity by the American National Bank, a *bona fide* purchaser. Divers facts are alleged in the bill, from which it appears that the notes, after they were delivered and a few days after they were discounted, became, as between the maker and the payees, accommodation paper and without consideration. The notes were not paid at maturity. The plaintiff informed the bank of the facts, offered to give it a bond of indemnity against loss and expenses, and requested it to sue E. S. Wheeler & Co., but they, having given the bank the certified checks of a third person to an amount larger than the notes, as collateral security, were permitted by the bank to bring a suit in its name against the plaintiff before a state court in St. Louis. The bank obtained judgment against the plaintiff, from which he appealed to the St. Louis court of appeals, where the cause is still pending.

The bill prays that the bank be decreed to deliver up, and that E. S. Wheeler & Co. procure to be delivered, to the plaintiff the three notes for cancellation, and that E. S. Wheeler & Co. satisfy the claims and demands of the bank upon said notes, and that the certified checks which were deposited by E. S. Wheeler & Co. with the bank may be applied in payment of the notes, and that an account may be taken of what the plaintiffs have paid in defending the action at law, and that E. S. Wheeler & Co. be directed to pay the amount to the plaintiffs, and that both defendants may be restrained from commencing any other proceedings against the plaintiff for the collection of the notes. The defendants demur to the bill upon the ground that a circuit court of the United States has no jurisdiction of the cause, and, in support of the demurrer, they rely upon section 720 of the Revised Statutes, which provides as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in causes where such injunction may be authorized by any law relating to proceedings in bankruptcy." The claim of the defendants is that the whole object of the bill is to prevent the further prosecution of the suit in the Missouri court against the plaintiff.

§ 277. *A federal court has no power to stay the prosecution of a suit in a state court.*

An injunction is not asked in terms against the prosecution of the suit, but it is true that the circuit court is not authorized so to control a suit in the state court by any proceedings as to tie the plaintiff's hands, and to compel that court to stay the prosecution of the suit. Thus, where an action was pending in a state court, the circuit court refused to compel the plaintiff and one of the defendants in the suit to interplead in the circuit court respecting the subject-matter in controversy, upon the ground that such decree "would be an exercise of that authority and control over the state court itself which can only be allowed to a tribunal of general jurisdiction under the same government." *City Bank v. Skelton*, 2 Blatch., 14.

§ 278. *Different courts may take jurisdiction of different actions growing out of the same subject-matter.*

But it is not improper for different courts to take jurisdiction of different actions respecting or growing out of the same subject-matter, although the effect of the judgment or decree of one court may be to modify or control the result of the suit in another court, and to limit or guide its decision. Thus (to use the illustration given for another purpose in *Buck v. Colbath*, 3 Wall., 334), "a party having notes secured by a mortgage on real estate may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to

recover a judgment on his notes, and in another court of law, in an action of ejectment, to get possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other." The circuit court could properly take jurisdiction of the action upon the notes, while the state court had jurisdiction of the bill for foreclosure, or of the action of ejectment, although the effect of the judgment and execution in the circuit court might be to prevent the state court from rendering a judgment or decree in favor of the plaintiff. There would be no interference with the orderly prosecution of the suit in the state court, even if, in consequence of the action of the circuit court, the pre-existing relations of the parties to each other have been varied, and therefore the judgment which would otherwise have been rendered in the state court has become unnecessary.

If the note and mortgage have been made by a surety, and, as between him and his principal, the latter was primarily bound to pay the debt, and there were equities which should compel the creditor to accept payment, if reasonably made, from the principal, a bill in equity would also lie in favor of the surety against the principal to compel him to pay the debt, and to compel the creditor to receive the money, if paid before payment had been enforced from the surety's property. Neither would the existence of the previous suits in the state court prevent a circuit court from taking jurisdiction of the last named suit, although, if the decree of the circuit court was carried into effect before judgment had been entered in the state court, the judgment or decree of the latter court might be very materially influenced by the result flowing from the decree of the circuit court.

In this case a *bona fide* indorsee and holder of a note has sued the maker in an action at law in a state court. The maker alleges that, by reason of certain facts, a court of equity can properly compel the indorser to pay the debt promptly, and the holder is made a party to the bill, so that it may be compelled to accept payment when made. The object of the bill is to force E. S. Wheeler & Co. to pay the debt, and, if practicable, to pay before judgment is obtained from the plaintiff's property; but there can be no compulsory action by this court to prevent the bank from continuing to prosecute its suit in the state court, and to collect by execution. It can proceed as rapidly as the state court will permit, and can collect its debt. If a decree is rendered in favor of the plaintiff in this court, and payment of its debt is made by E. S. Wheeler & Co. before judgment is rendered in the state court, the action of the court will be modified, and in a certain sense controlled, by the consequences of a decree of this court; but the mischief of a conflict of jurisdiction will not exist, and the comity and courtesy due to another court will not have been violated.

§ 279. *A prayer for cancellation of notes without payment is objectionable.*

The prayers of the bill are twofold—to compel E. S. Wheeler & Co. to pay the debt, and to compel the bank to receive payment. The first class of prayers cannot be objected to, and the latter class is likewise unobjectionable under the principles which have been suggested, if the prayers are properly framed. The first prayer is that the American National Bank be decreed to deliver up said three promissory notes for cancellation. Literally read, this prayer is objectionable, for it asks for cancellation without payment; which, under the allegations of the bill, the court would have no right to grant. The pleader intended to ask that the notes should be delivered to the plaintiff when paid

by E. S. Wheeler & Co. This relief is not necessary; but it is proper, if the notes are paid by the indorsers, that they should not be outstanding as apparent debts against the plaintiff. The prayer that the avails of the checks may be applied in payment of the notes is not objectionable, it being understood that the bank is at liberty to pursue all its remedies, and that no decree can be granted by this court restricting its right to prosecute the suit in the state court, and obtain and levy execution.

The demurrer is sustained, with leave to the plaintiff to amend as to the first prayer of the bill.

HAY v. ALEXANDRIA & WASHINGTON RAILROAD COMPANY.

(Circuit Court for Virginia: 4 Hughes, 331-377. 1882.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—This is a bill, in the nature of a general creditors' bill, brought to settle the priorities of all liens upon the property of the Alexandria & Washington Railroad Company, for the sale of the same and a distribution of the proceeds.

In the year 1881, the complainant in this suit recovered a decree in chancery and a judgment at law in this court, against the Alexandria & Washington Railroad Company, reviving old judgments which had been recovered in a court of the state of Virginia in 1857, 1858, 1859 and 1860, for the aggregate amount of nearly \$29,000, with costs, and interest from the dates of the original causes of action, the whole amounting now to about the sum of \$80,000. This bill was filed on the 24th of December, 1881. It professes to set out in detail, besides the judgments and decrees obtained by the complainant, all the liens now resting on the property of the said company. It makes parties defendant of all the creditors holding these several liens. It avers in terms that there are no other lien creditors than those whose liens it enumerates *seriatim*. It makes also party defendant the Alexandria & Fredericksburg Railway Company, which is alleged to have the property of the said Alexandria & Washington Company in custody as lessee or otherwise.

Among those made parties defendant to the bill is one Joseph Thornton. Among the creditors claiming to hold liens and made defendants to the bill is the District of Columbia (formerly the city of Washington), and J. H. and A. T. Bradley, trustees in a deed made by the Alexandria & Washington Company, to secure the said District of Columbia for guarantying certain bonds or certificates of the said company.

In consequence of some defect in or delay in recording the said deed of trust, another deed was afterwards made between the same parties confirming and ratifying the original deed. These are treated in the sequel as one deed. This would therefore seem to be in effect a general creditors' bill, though it does not contain a clause couched in the very words ordinarily employed in the draft of general creditors' bills, to the effect that the bill is brought on behalf of the complainant and of all other creditors of like character who may come in and take part in the suit.

The bill alleges that the defendant, the Alexandria & Washington Railroad Company, is utterly and absolutely insolvent; that it owns no other property but the road-bed of the railroad extending from the south end of the Long Bridge (which crosses the Potomac river opposite Washington), some four or five miles to the vicinity of Alexandria; and that it is indebted in an aggregate

sum of about \$400,000. Some of the lien debts enumerated in the bill as resting upon this road have been ascertained and adjudicated as against the Alexandria & Washington Railroad Company, and as between the particular parties to the record there,—in a suit in chancery which was brought in 1857, in the circuit court of Alexandria county, entitled *The Alexandria & Washington Railroad Company v. Fowle, Snowden & Co. et al.* That suit was originally brought by the said railroad company, but was afterwards proceeded with under a cross-bill filed in the same proceeding by J. H. and A. T. Bradley, the trustees as heretofore mentioned, in the deed from the said company given to secure the corporation of the city of Washington (now the District of Columbia) for the city's guaranty of the company's bonds. These debts, resting as liens upon the Alexandria & Washington Railroad, thus for certain purposes ascertained and adjudicated, are set out in the bill here; and the holders of them made parties defendant to the suit here.

On the second day of the January term, 1882, of this court, the complainant in the bill here came into this court, and moved for a receiver; and also moved that notice of the motion be ordered to be given to all parties interested, and that it would be heard on the 7th of the same month. The latter motion was granted. On that day, at the instance of some of the defendants, the motion for a receiver was continued to the 17th of January, and on the latter day, Thornton, one of the defendants, filed a plea to the jurisdiction, and there was a hearing of the motion, on elaborate argument extending to the 18th of the same month. On this latter day, for reasons stated orally from the bench, this court decided to grant the motion for a receiver; and took time to put those reasons in writing.

A receiver was accordingly appointed on the 19th of the same month, and this opinion in writing is now filed *nunc pro tunc*, again setting out the grounds of the action taken by the court. The objections urged against the appointment of a receiver are embodied in Joseph Thornton's plea to the jurisdiction of this court. This plea denies the power of the court both over necessary parties and over the controversy. Joseph Thornton claims to appear only for the purpose of filing this plea. It would seem that there is no denial of a proper service of process upon all who are named as parties defendant to the bill residing in this district, and of notice of the pending of this suit to all other parties residing elsewhere.

The plea alleges in substance that the bill joins as co-defendants persons who are not subject to the jurisdiction of this court, namely, 1st, the District of Columbia, a municipal corporation created, organized and established by and under the laws of the United States, etc., etc.; and 2d, Joseph H. and A. Thomas Bradley, trustees, etc., who are citizens of the District of Columbia; and it also alleges that the presence of these persons or parties is essential to the settlement of the equities in this cause. The plea further avers that the subject-matter of the said bill, and the matters in controversy therein, were at the time of the filing of the said bill and still are pending, and yet undisposed of, in the circuit court of Alexandria county, a court of competent jurisdiction, in the suit of the Alexandria & Washington Railroad Company *v. Fowle, Snowden & Co.*, the record of which cause is now here shown to the court.

It is not pretended that the Alexandria & Washington Railroad Company is not hopelessly insolvent, and that the situation of its affairs is not such as imperatively to demand the appointment of a receiver. The only objection urged is, that this court cannot legally appoint a receiver for want of jurisdic-

tion over the parties and the controversy. These objections are fairly presented in the plea of the defendant Joseph Thornton; and so my task is simply that of dealing with the objections set forth in that plea.

First, as to the parties. It is true that the District of Columbia is a corporation not within the jurisdiction of this court for ordinary purposes. The same is the case as to the two Messrs. Bradley, trustees; who are inhabitants of the District of Columbia, and who are not inhabitants of the eastern district of Virginia. And it is true that this corporation and these trustees are parties necessary to any suit for the settlement of the priorities of liens upon the Alexandria & Washington Railroad.

It is to be observed, *in limine*, that the property bound by the mortgages, judgments and decrees standing against the Alexandria & Washington Railroad Company is exclusively, or almost exclusively, real estate; and that this real estate lies wholly in the eastern district of Virginia; moreover, that the object of the present suit is to subject this real estate, lying exclusively in this district, to the liens enumerated in this bill, according to such priorities as the court may settle by its decree; one of these being the lien claimed by the District of Columbia under a deed in which the Messrs. Bradley are trustees.

§ 280. *Act of March 3, 1875, gives the circuit court jurisdiction over property within its district in suits to enforce liens, though some defendants are non-resident.*

The eighth section of the judiciary act of March 3, 1875 (1 Supplement to Revised Statutes of the United States, page 176), provides that when in any suit in a circuit court of the United States, to enforce any equitable lien, or remove any cloud upon the title to real or personal property within the district where such suit is brought, one or more defendants therein shall not be an inhabitant of or found within said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, etc., by a day certain to be designated, which order shall be served on such absent defendant or defendants if practicable wherever found, etc., etc., or when such personal service upon such absent defendants is not practicable, then order of publication shall be made, etc., etc.; and then it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of the suit, etc., etc., but such adjudication shall affect only the property within such district. The terms of this law have been thus far complied with, and the order of court requiring notice of the motion for a receiver to be served upon the defendants, has been served in this suit upon the principal officers of the District of Columbia, and upon the Messrs. Bradley, who are inhabitants of that District.

§ 281. *The question, whether an act of the District of Columbia is ultra vires, is a question arising under the laws of the United States.*

This bill, moreover, charges that the act of the District of Columbia (when known as the city of Washington), in guarantying bonds of the Alexandria & Washington Railroad Company, was *ultra vires*, and null and void, and that the deed of trust made by the company to the Messrs. Bradley, as trustees, to secure such guaranty, is therefore a nullity, and is consequently not a lien upon this railroad. The first section of the judiciary act just referred to (1 Supplement Revised Statutes, page 173) provides "that the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of \$500, and arising

under the constitution or laws of the United States or," etc., etc. Thus it seems clear to me, that in respect to the property of the Alexandria & Washington Railroad Company, on which the District of Columbia claims a lien, this court has jurisdiction, under the eighth section of the judiciary act, 1875, to summon the District and its trustees before it, to look after their interests in this particular property; and it seems equally clear that, in respect to the right and power of that corporation to have guarantied the bonds of the railroad company, a right which depends exclusively upon the provisions of its charter derived from congress, this court has jurisdiction under the first section of the judiciary act of 1875; it being an elementary principle of law that, whereas a natural person may do whatever is not forbidden by law, yet a "corporation can do only what is authorized by its charter." *Railroad Company v. Harris*, 12 Wall., at page 81.

I think it clear, therefore, that for the purpose of determining the liens resting upon the property within this judicial district, belonging to the Alexandria & Washington Railroad Company, this court has jurisdiction as to *parties*, by personal service of process wherever found, on the District of Columbia and the Messrs. Bradley, as parties defendant in this suit; and that this branch of Joseph Thornton's plea to the jurisdiction must be overruled.

§ 282. *A suit pending in one court which has not actual possession of the property does not bar a suit in another court unless the controversies are identical.*

I come now to the other branch of the same plea, namely, that which makes objection that the circuit court of Alexandria county has already possession of the *controversy* of which this court is asked by this bill to take cognizance, and of the subject-matter, or property, which is the object of the controversy. It is useless to say that the property of the Alexandria & Washington Company, the *corpus*, or *res*, sought to be subjected, is not yet in the custody of any court [I speak as of the 18th January, 1882]; but, as alleged, is in the possession and use of the Alexandria & Fredericksburg Railway Company, under lease or contract.

If the *property* itself were actually in the corporeal possession of the state court, in the person of a receiver or other officer, that would be conclusive, and this court would and could not interfere; but as that is manifestly not the fact, my only remaining duty is to inquire whether the *controversy* exhibited by this bill was already within the cognizance of the state court when this bill was brought; for if it was, then that fact would be equally conclusive against the jurisdiction of this court.

In order that the controversies of the two suits shall be identical, the parties to them must be the same, and the objects of the suits and the issues in them the same. The mere fact that there is but one property subject to the respective decrees in the two suits is not sufficient to identify them.

I have already said that the bill here is, in its essential nature, a general creditors' bill, seeking to bring all lienhold creditors of the Alexandria & Washington Railroad Company before the court, in order that their claims shall be marshaled, and the priorities attaching to them settled; and bringing in also the Alexandria & Fredericksburg Railway Company, which has possession of the *res* in controversy, under lease or contract, in order that the decree of the court when rendered may be effectual, and that the proceeds of the sale of the property of the Alexandria & Washington Railroad Company, when realized, may be distributed with due regard to the rights of all parties in interest. A bill with fewer parties and less ample scope would not be effectual for a proper ad-

judication of the affairs of this company, or for the ends of complete justice. The inquiry, therefore, is, whether the suit in the state court, the record of which is exhibited with the plea of the defendant Thornton, is a suit in which all lienholders are parties, and in which the custodian, under lease, of the property that is sought to be subjected to the liens resting upon it, is before that court.

An inspection of the record of the suit in the state court discloses the fact that Alexander Hay, the complainant in the bill here, who claims to hold a lien for some \$80,000, is not a party there. It discloses that neither Walter Lenox, in his character as trustee, nor any one of the beneficiaries of the deed of which he is trustee, representing a lien of some \$60,000, is a party there; nor is the deed itself, which Lenox represents, made a part of the controversy by either the bill or the cross-bill in that suit; nor is the Alexandria & Fredericksburg Railway Company, which has contract rights in, and actual possession of, the property of the Alexandria & Washington Railroad Company, a party to that suit. Obviously and conspicuously, therefore, the parties to the suit in the state court are not the same as those here; and there would seem to be such a deficiency of parties to that suit, for purposes of complete justice, that though it has been pending for nearly twenty-five years, and the Alexandria & Washington Railroad Company has been notoriously insolvent for at least half the time, no receiver has been appointed by that court in that suit though it has been asked to do so.

So much as to parties. In respect to the controversy, the two suits differ from each other even more widely. The original object of the suit in the state court, which was brought by the Alexandria & Washington Railroad Company, was to obtain an adjudication upon the relative priorities of the lien of the city of Washington, in which the Messrs. Bradley are trustees, and that of Fowle, Snowden & Co., in which Mr. Kinzer is trustee. It made only those creditors and their respective trustees parties defendant, who all answered. The trustees in the deed under which the District of Columbia claimed, being already defendants in the suit, then filed a cross-bill, setting out their own case, and making no new parties defendant, except James S. French, individually, who was already party to the record as president of the Alexandria & Washington Railroad Company.

There were numerous judgment liens then outstanding against the company, among them some of those which were the origin of the claim of the complainant here, Alexander Hay. But the holders of these liens were not made parties, either by the original or the cross-bill. There was a deed of trust already mentioned, in which Walter Lenox was trustee, made for securing \$30,000. Neither Lenox as trustee, nor any of his beneficiaries, were made parties. Neither the original nor the cross-bill contained the usual clause of a general creditors' bill, either in form or substance; nor was either bill in scope or aim or purpose a bill for marshaling all creditors and their claims, or for ascertaining all liens and their priorities.

The cross-bill contained no other prayer than one for its own special benefit, which was in these words: "Your orators further pray that the said deeds of trust to the said J. H. and A. T. Bradley may be decreed and declared to create a lien on the property and franchises of the said Alexandria & Washington Railroad Company, prior to any other incumbrance, and that the said lien may be enforced against the said property and franchises so conveyed, and the proceeds arising from a sale thereof may be applied to the reimbursement

and relief of your orators, on account of their guaranty of, etc., and your orators further pray for such other and further relief as may be consistent with equity," etc. The decree was, of course, only such as would be responsive to the specific prayers of one or the other of the bills, and as could be given between the particular parties to that record. It was pronounced May 25, 1859. An appeal was taken to the supreme court of appeals of Virginia, and the questions submitted to the appellate tribunal were simply questions as to the relative priorities of two only of the liens now resting upon the property of the Alexandria & Washington Railroad Company. It is plain, therefore, that the controversy in the state court was much narrower than, and widely different from, the controversy in the suit here, and so the second branch of the defendant Thornton's plea must be overruled.

§ 283. *Judicial comity.*

On the whole, I see no objection either on the score of jurisdictional right or of judicial comity, to my allowing this proceeding to go on, and to the appointment of a receiver in this suit at once. Surely the necessity for the appointment of a receiver is sufficiently urgent; and it seems to me that the suit in the state court is not such as to authorize such a measure on its part. Indeed, some of the questions which form the principal gravamen of the suit here, could not be raised by the parties who are the *domini litis* in the state court. One of the objects of this suit is to invalidate the lien in favor of the District of Columbia; whereas the trustees and beneficiaries in both the Kinzer and Lenox deeds, if the allegations in the pleadings and exhibits be true, are estopped, by express stipulation, from contesting its validity.

Moreover, the objects of this suit could not be accomplished by the suit in the state court, until the proceedings there were so amended as to make the complainant here a party there; and even though this were done, and Alexander Hay were brought into that litigation, he would have a right under the laws of the country to remove so much of the controversy as affected his own rights into this court. He has a constitutional right (jurisdictional conditions permitting) to have any decision affecting his interests by an inferior court reviewed by the supreme court of the United States, rather than by the supreme court of the state of Virginia; and I presume from the fact of his bringing this suit here, that he desires to avail himself of that right; and would, if he were made party to the long pending litigation in the state court, at once remove the controversy into this court.

Even, therefore, if the proceeding in the state court were so amended, by the addition of parties and otherwise, that it would be adequate to the ends of complete justice between all persons holding liens upon this railroad, yet nothing could be gained by this court's desisting from further proceedings in this suit; for the complainant here, on being brought into the suit there, would have a right to remove that suit here, which I have a right to presume that he would exercise. It is plain, therefore, that nothing but delay would result from staying the proceeding in this court, and sincerely declaring that if the case were such as to really raise the question of judicial comity, I would cheerfully defer to the jurisdiction of the state court; I have no hesitation in proceeding in the case and appointing a receiver.

UNION TRUST COMPANY *v.* ROCKFORD, ROCK ISLAND & ST. LOUIS RAILROAD COMPANY.

(Circuit Court for Illinois: 6 Bissell, 197-203. 1874.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—It is not proposed to review at length the able and exhaustive argument of the counsel for the respective parties in this case, as it seems to us that a few of the propositions discussed are sufficient for the purpose of this motion. The main question arising is one of great delicacy, and the history of the jurisprudence of this country shows a most commendable disposition on the part of both the federal and state courts not to impinge upon each other's jurisdiction; but the delicate nature of the matter furnishes no reason why the court to which jurisdiction belongs should not firmly assert and maintain its rights. The subject of this controversy is equally within the jurisdiction of the state and federal courts, always assuming the jurisdiction of the federal courts to be invoked by persons authorized to bring suit in those courts.

§ 284. *The court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation.*

It will hardly be necessary to cite authorities to show that it is, and has long been, the settled rule of law in all cases of conflict of jurisdiction, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res*, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction. *Bell v. Ohio, L. & T. Co.*, 1 Biss., 260; *Riggs v. Johnson County*, 6 Wall., 166; *Bill v. New Albany, etc., R. R.*, 2 Biss., 390; 1 Abb. U. S. Pr., 223, and cases cited. The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained.

§ 285. *Full control over judgments remains in the court during the term at which said judgments are rendered.*

It is also equally well settled that the power of a court over its judgments, to set aside, modify or annul, is unlimited during the entire term at which such judgments are rendered. *Doss v. Tyack*, 14 How., 297; *O'Connor v. Mullen*, 11 Ill., 116; *Walden v. Craig*, 14 Pet., 147. The common law rule, that an execution will not issue until the close of the term, is but a familiar illustration of the proposition. So, too, as a general rule, the liens of judgments do not attach till the close of the term, and all for the reason that during the term a judgment is *in fieri* in the breast of the court, liable to such modifications or reversal as shall seem best to subserve the ends of justice. The right of a court of equity to allow amendments to a bill, and to allow the filing of a supplemental bill at any time during the term, after having sustained a demurrer to the bill, was conceded upon the argument to be a general rule, subject, however, to the exception contended for, that when the court, by its judgment on the de-

murrer, dismissed the case out of court, it could not resume jurisdiction as against third parties who had in good faith acquired rights while the judgment of dismissal remained in force.

Applying these propositions to the facts of this case, we find that this court, on the 20th of July last, sustained a general demurrer to complainant's bill, and entered judgment dismissing the suit. On the 22d of July, Nickerson filed his bill in the state court, and made his motion for a receiver. On the 24th of July, which was yet of the same term at which the demurrer was sustained, the order dismissing the cause was set aside in this court, on motion of the complainant's solicitors, and leave to amend and file a supplemental bill given; and on the 25th of July, Nickerson, by consent of the defendant, obtained an order appointing receivers in the Henry county circuit court.

§ 286. *The parties to a controversy are chargeable with notice of the power of the court over its judgments during the remainder of the term.*

The solicitors of Nickerson had notice of the motion to amend in this court, and under the facts in this case, Nickerson is chargeable with notice of the action of this court in the premises, and that this court had resumed jurisdiction of the suit before he took his order appointing a receiver. Nickerson was not a stranger to this suit. He had appeared by his counsel on the argument of the demurrer, and resisted the complainant's suit, although not technically a party to the record. He was then chargeable with actual as well as constructive notice that this court might, at any time during the July term, set aside its judgment on the demurrer and proceed with the case. When the order was made by this court, setting aside its judgment of dismissal, the case stood as if this judgment had never been rendered. The court had never lost jurisdiction. Suppose, for illustration, the complainant had appealed within sixty days, as he might, or at any time during the term, from the judgment of this court, and the appellate court had reversed our judgment, it would not, of course, be contended that the jurisdiction of another court could attach by any form of proceeding so as to divest this court of jurisdiction; and yet a complainant is not bound, in order to save jurisdiction, to pray an appeal instanter a judgment or decree is rendered against him. He may lie still and take no action for days, perhaps months, and then by taking his appeal in due form all rights of jurisdiction are preserved intact. So, too, instead of resorting to an appellate court, the complainant may ask this court to revise its own order or decree, and in furtherance of justice such request may be granted and the former judgment annulled and set aside any time during the term.

We find, then, that this court had not lost jurisdiction of this case when the suit in Henry county was commenced; and although the suit was technically dismissed on our record from the 20th to the 24th of July last, yet it was all the time subject to the power of the court to set aside that order; and Nickerson could not, by commencing a suit in another county, supersede the jurisdiction of this court over the subject-matter.

§ 287. — *rights of third parties acquired in good faith may, in the discretion of the court, be regarded.*

Undoubtedly cases may be found where courts have, in their discretion, refused to set aside their judgment and proceed with the case, after having once dismissed it, where the rights of parties, acting upon the faith that the dismissal was final, had intervened; but such cases are an exception to the general rule, as a matter of equitable discretion, rather than of right, and are for the protection of those acting in good faith. In this case, both Nickerson

and the defendant, the railroad company, seem to have left this court, and rushed in haste into the state court, and there consented to the appointment of receivers, while they had strenuously resisted such appointment here. This fact, with others, appearing in the record, tends strongly to prove that the proceeding in the Henry county circuit court was not commenced by Nickerson in good faith, and that the case does not come within the exceptions which have been cited.

The necessity for the appointment of a receiver was not discussed on the argument, for the reason, as we infer, that the defendant, by consenting to such an appointment by the state court, has virtually admitted its necessity.

Opinion by DRUMMOND, J.

I concur in general in the views of the district judge. I may be allowed to express the hope that there will be no trouble growing out of this decision, and that the state court will not insist upon its receiver retaining control of the property. If it should, it may then become a question for this court to determine what course shall be pursued if the receiver appointed by this court shall seek to obtain possession of the property, and should be resisted by the receiver appointed by the state court. The only question there is in this case is whether the appointment of a receiver by the state court is of such a character as to confer rights which are to be protected under the rule already stated. During the interregnum between the dismissal of the case in this court and its resumption by the order setting aside that dismissal, has anything occurred so that the rights of other persons need protection? They are such only in this case as grow out of the appointment of the receiver by the state court. It cannot be said that Nickerson has himself acquired any special rights or interests which are to be affected. It is only whether the state court should maintain its control over the property. Now, conceding that there might have been during this interval rights acquired by third parties which should be protected by this as well as all courts, what was the *status* of the case at the time that the receiver was appointed? If we concede that Nickerson might commence a suit in the state court for the appointment of a receiver to take possession of the property the same as was asked by the plaintiff in the original case in this court when this court resumed control of the case, as it did by its order of the 24th of July setting aside the previous order of dismissal, then Nickerson and his counsel should have suspended all proceedings in the state court as to the appointment of a receiver. Whatever may be said as to the order of dismissal, the cause then stood precisely, as my brother judge has said, as though no order of dismissal had ever been made; and it presents, therefore, a case where there was, at the time that the order was made by the state court for a receiver, a bill pending in this court which also asked for a receiver of the same property, and of which this court had jurisdiction.

These conflicts, of course, are always unpleasant to us. We desire to proceed harmoniously with the state courts and state judges. We cannot, however, shrink from duties imposed upon us, where we have once obtained jurisdiction of a case, as we think we have here. We believe that it is our duty to maintain it, according to well-settled principles. And we trust that there may be no such conflict between the state and federal courts in this instance as has been intimated. However this may be, we have to proceed according to our views of law and equity in the case. We would hope that there will be no controversy about the person to be appointed receiver. If the plaintiff can

suggest some names, and the counsel on the other side have no objection, we shall appoint him. But if they object, we may appoint one of our own motion.

GILMAN v. PERKINS.

(Circuit Court for Illinois: 7 Federal Reporter, 887-892. 1881.)

Opinion by BLODGETT, D. J.

STATEMENT OF FACTS.—This is an action of replevin for the recovery of a valuable horse, alleged to have been unjustly taken and detained from the plaintiff by the defendants. Four pleas were interposed: *First, non cepit; second, non detinet; third*, property in Robert I. Lee and not in the said plaintiff; *fourth*, that the defendant Perkins was at the time when, etc., sheriff of Rock Island county, in the state of Illinois, duly qualified and acting as such; that on the 4th day of September, 1878, the Topeka National Bank, of Topeka, Kansas, sued out of the circuit court of said county of Rock Island its writ of attachment of that date against one Robert I. Lee for the sum of \$3,285.76, with interest from the 1st day of December, 1876, and caused the same to be directed to the sheriff of said county to execute, in and by which writ the sheriff was commanded to attach so much of the estate, real and personal, of the said Robert I. Lee, to be found in his county, as should be sufficient to satisfy the indebtedness mentioned in the writ, and such estate so attached in his hands to secure, so as to provide that the same might be liable for the proceedings thereupon according to law, which writ was made returnable on the first Monday of January next after the date thereof; and that such writ came duly into the hands of defendant Perkins, as such sheriff, to execute, and was by him, on the day of the date thereof, duly executed by levying upon and taking into his possession the horse in question; and that the defendant Perkins held the horse in question at the time when, etc., by virtue of the said attachment and levy.

It was further averred that the horse, at the time when the same was levied upon by virtue of the writ of attachment by defendant as aforesaid, was, and is, the property of the said Robert I. Lee, and not the property of the plaintiff; and that the said horse was properly subject to be levied upon and taken by virtue of the said writ of attachment as aforesaid. Issue was joined upon these pleas, and a trial had before a jury, in which the main question made upon the proof was as to the title of said Robert I. Lee to the horse,—the defendants contending that plaintiff's alleged title was fraudulent as against the creditors of Lee, and that the plaintiff could not, under the law and facts in the case, hold such horse as against the said Topeka National Bank, a creditor of Lee. The jury, by their verdict, found the issues for the plaintiff, and defendants now move, *first*, to dismiss the cause for want of jurisdiction after verdict and before judgment; *second*, for a new trial.

The motion to dismiss for want of jurisdiction is based upon the ground that the property in question, at the time it was taken by the marshal of this court under its replevin writ, was in the custody of the sheriff of Rock Island county, under the writ of attachment issued out of the circuit court of that county against the property of Robert I. Lee, and that it was therefore in the custody of the law of said state court, and could not be taken from said court by the process of any other court of concurrent jurisdiction. In support of this position the defendant relies mainly upon the decision of the supreme court of the United States in *Freeman v. Howe*, 24 How., 450 (§§ 255-260, *supra*).

The only question in my mind is whether the defendants, after having tried this case upon its merits, shall now, after a verdict and practically on a motion for a new trial, be heard to allege want of jurisdiction in this court. If, in the first instance, or at any time before a trial upon the merits, the defendants had submitted to this court that the property in question was in the custody of the state court, and that the controversy over the ownership of it, which was initiated by the levy of the writ of attachment upon it as the property of Lee, could and should properly be remitted to that court for determination, this court, in the light of *Freeman v. Howe*, and other cases in the supreme court of the United States involving the same principle, would undoubtedly have dismissed the cause and returned the property to the officers of the state court.

The defendants might with propriety have said to this court: "This property is alleged to be the property of Robert I. Lee. It is seized as such; it is in the possession of the state court as such. The law of the state of Illinois (chapter 11, § 29, Rev. St. of Illinois) expressly provides that any third person claiming the property attached, as this property has been, can interplead and protect his own title; and therefore this court ought not to take from the state court the controversy of which it had properly acquired jurisdiction." But instead of doing this, the defendants plead to the merits, and try the case upon the merits; challenge the validity of plaintiff's title, charge the plaintiff's title is fraudulent as against the attaching creditor of Lee, and only after their defeat by the jury upon that issue do they raise the question of jurisdiction.

§ 288. *This case distinguished from Freeman v. Howe.*

In the case of *Freeman v. Howe* the marshal of the United States had levied a writ of attachment upon certain cars as the property of the railroad company, the defendant in the attachment. A mortgagee of the railroad company brought replevin in the state court, and the supreme court of the United States in that case held that the possession of the marshal could not be interfered with by the process of the state court. This case is not strictly analogous in its facts to that. Here the attachment was by the officers of the state court, and the replevin was from the federal court. In *Freeman v. Howe* the controversy in regard to the title to this property could not have been removed from the federal into the state court, but in this case it might have been removed from the state to the federal court. If the plaintiff in this replevin suit had interpleaded under the statute of Illinois in the original attachment suit, he undoubtedly could, under the act of 1875 in regard to the removal of cases from the state to the federal courts, have removed the controversy between himself and the sheriff, as to the sheriff's right to attach this property as the property of Lee, from the state into the federal court; and ought not this court to presume that the defendants acted in this case upon the assumption that the controversy was one which might, in some form, be properly taken from the state into the federal court, and therefore waived all question as to the manner in which it was so brought before the federal court, and tried it here upon its merits, in the first instance, on the ground that he knew he might ultimately be compelled to do so?

It will be noticed that the extreme doctrine of *Freeman v. Howe* is somewhat modified in its practical application by the subsequent case of *Buck v. Colbath*, 3 Wall., 334; and it is very clear, in the light of the two cases, that the supreme court does not now hold to the extreme doctrine that the controversy in regard to the ownership of this property, having originated in the

state court, must necessarily, under all combination of fact, be held and determined there, and there alone.

§ 289. *Where the federal court would refrain from taking jurisdiction only by reason of comity, the objection must be seasonably taken.*

In this case the court could have taken jurisdiction of the parties, as the citizenship was such as to give it such jurisdiction of them, and it would only refrain from taking jurisdiction of the subject-matter by reason of comity towards another court of concurrent jurisdiction. The parties to assert the right of the state court to keep possession of the property were either the officers representing that court or the attaching creditor who had selected that forum. But neither of those parties disputed the jurisdiction of this court, on the ground that it belonged for any reason to the state court, until after the trial on the merits, and then, I think, it was too late to raise the point. It seems to me that these defendants may be justly charged with having been willing to experiment with this court; and, after having had a trial and being defeated, they are now disposed to fall back upon a point which they ought to have raised in the first instance. The motion to dismiss for want of jurisdiction is therefore overruled.

LEWIS v. THE SHIP ORPHEUS.

(District Court for Massachusetts: 3 Ware, 143-147. 1858.)

Opinion by WARE, D. J.

STATEMENT OF FACTS.—The first question which arises in these cases is whether the court has jurisdiction. The right of the court to take cognizance of the subject-matter is not questionable, but the Orpheus was attached under process from the state court on the 5th of March, and she was arrested by the marshal under process from this court on the 15th.

§ 290. *Property in possession of a state court cannot be taken by process of a federal court.*

If the vessel, at the time when the marshal served his precept, was in the custody of the sheriff, it is well settled that the arrest of the marshal was illegal and void. The case of *The Robert Fulton*, 1 Paine, 620, and that of the *Oliver Jordan*, decided at the last term of the circuit court in Maine, are directly in point. It is said by the supreme court that under our system of government there is no mode of preventing an embarrassing and dangerous conflict of jurisdiction between the courts of the states and those of the United States, but to consider personal property which is in the custody of one to be withdrawn from the process of the other, except in those special cases provided for by statute. Act of March 3, 1833, vol. 4, page 634; 3 Peters, 299; *Hagan v. Lucas*, 10 Peters, 401; *Pulliam v. Osborne*, 17 How., 471.

To meet this difficulty, it is said that in the proceedings under the state process there were fatal irregularities and defects, which render the whole proceedings void. But the ready answer is that the case is still pending before the state court, and the question whether these irregularities are fatal must be decided there, and not by this court. It may be a good reason why these libels should not be dismissed, but allowed to remain on the docket till that case is decided. If the state court dismisses the suits on which the vessel was attached by the sheriff, it may appear that the seizure of the marshal was lawful, and these cases proceed to a hearing. But until it is ascertained whether this court has jurisdiction, it would be altogether irregular to proceed to a final decree.

§ 291. *What is sufficient possession of property taken under an attachment.*

When the sheriff made the attachment he appointed Mr. Jameson keeper, and put him in possession of the ship. The keeper was examined, and he says that he remained keeper for seventeen days, two or three days after the arrest by the marshal. At the time when he went aboard the ship was unfinished and the carpenters were employed in completing the joiner work. During the whole time the weather was extremely cold and no fire was allowed in the ship, and on account of the severity of the weather the keeper did not remain aboard during the nights. But as she lay at the wharf the vessel was so high that there was no entrance aboard but by a ladder, which was placed there in the morning and taken away at night, and the keeper was there first in the morning before the ladder was put up and last in the evening when it was removed. Through the whole period of his custody, in the day time, he was either in the vessel or near her, on the wharf or in a counting-room, where the vessel was in plain sight, and was at no time during the day out of sight of the ship, so that it was impossible for her to be removed without his knowledge. During the whole time joiners were at work on the vessel, and many persons were coming and going to visit and look at her, and others were employed in taking in cargo. Mr. Jameson says that he does not know whether he was in the vessel or not when the marshal made the arrest, he not knowing personally the officer, and that he did not know of the arrest until two or three days after it was made, when he notified the marshal's keeper of his possession.

Such are the facts with respect to the sheriff's custody, and the question is whether it was sufficient to satisfy the law. My opinion is that it was. The nature and kind of possession of personal property that is required of an officer to preserve an attachment depends on the nature of the property. Light articles of small value may properly be removed and kept in immediate possession. But this is impracticable with large articles upon a ship. All that is necessary in respect to such articles is, that the custody be such as will enable the keeper to assert his possessory rights and prevent its being withdrawn without his knowledge. So it has been adjudged by the supreme court of the state. Where heavy blocks of granite were attached and put in possession of a keeper, whose house was within sight of them, and who passed them daily in going to and from his work, this was held to be a sufficient possession without removing them. *Sanderson v. Edwards*, 16 Pick., 144; *Hemmenway v. Wheeler*, 14 Pick., 408.

§ 292. *When a voidable consent to jurisdiction is to be avoided.*

It is further contended that whatever objection there may have originally been to the jurisdiction it has been waived by the claimant's stipulation, by which he *submitted to the jurisdiction*. Whatever may have been the effect of a stipulation if it had been purely voluntary, I do not think it necessary to determine. As the subject-matter is clearly within the jurisdiction of the court, if it were wholly voluntary it might be taken as a waiver of any other objection. But with a consent extorted by duress it may be otherwise. It is true that an enforced consent is still consent, *evicta voluntas est tamen voluntas*, but it is voidable. To avoid it in this case, by an objection to the jurisdiction, I admit that the exception must be taken in a reasonable time. In the admiralty it may be taken by a voluntary plea before answering, or it may be taken in the answer. In this case the objection has been made in the answer, and this is in season.

§ 293. *When consent to jurisdiction is voidable through duress.*

Is, then, the claimant's consent to submit to the jurisdiction voidable? The facts are these: The ship lay, when she was arrested, at Lewis' wharf in Boston, and being in the custody of the sheriff the arrest was void. She was then bound on a distant voyage, and partly laden. In order to liberate her from the arrest, and to enable her to proceed on her voyage, the claimant entered into this stipulation. But for this the voyage must have been broken up, and the vessel remained in custody for an indefinite time, which the progress of the several suits show must have been from the middle of March to the middle of October, seven months at least. Was this consent, it being the only possible means of liberating the vessel, and saving to the owner a heavy loss, so far voluntary as to deprive him of the right of objecting to the legality of the seizure? I think it was not. It was a consent given under duress and constraint, not of his person but of his property, extorted from his fears, not of personal harm, but of a large pecuniary loss. A court professing to be guided in its jurisprudence by the principles of an enlarged and liberal equity ought to be slow in lending itself to enforce an engagement obtained by such means. According to Domat, when the violence or constraint under which one acts is such as that reasonable prudence obliges him to surrender some property lien, some right, or some other interest, rather than resist, there is wanting that liberty and equality between the parties, which is required to render engagements binding, and a consent so obtained ought to be annulled. Domat, Liv. 1, Tit. 12, sec. 4, *in principia*.

§ 294. *Construction of a stipulation of submission to the jurisdiction.*

If this stipulation were to be considered as of the nature of a contract, there seem to be strong reasons in equity against enforcing it by the active agency of the court. But in fact it has none of the qualities of a contract. A contract is an agreement entered into by the mutual consent of the parties, but a stipulation is an instrument taken by order of the court; its terms are determined by the will of the court, and not by that of the parties. Consequently it is to be interpreted by the intention of the court only, as to the nature and intent of its obligation. It being an instrument taken in the interest of justice to sustain the jurisdiction of the court, it ought not to receive such a construction as would deprive either party of any of his legal rights. This clause, by which the party submits to the jurisdiction of the court, seems to be taken from the stipulation entered into in libels *in personam*, *in judicio sistendi*, or answering to the action, and I think should be held to have the same force and meaning as in that. That required the promisor to remain in court and submit himself to its jurisdiction, as far as he was subject to it when the suit was commenced, no further. If, after the service of the process, he acquired a new right of declining the former, that was waived, but it did not deprive him of any right of defense he had when the process was served. *Lane v. Townsend*, 1 Ware, 304. The object was to preserve the authority of the court as it then was, and not to enlarge it. My opinion is that any rights which the claimant had of objecting to the jurisdiction of the court when the stipulation was entered into he still retains.

In the present state of facts, it does not seem to me to be proper to dismiss the libels. They may remain on the docket and await the decision of the state court. If their decision is that the proceedings are so defective that the pending suit must be dismissed, the objection to the jurisdiction of this court may be removed and the case proceed. Or if the parties prefer so to do, the suits here may be discontinued, and they may seek their remedy in the state court.

WILMER *v.* ATLANTA & RICHMOND AIR LINE RAILWAY COMPANY.

(Circuit Court for Georgia: 2 Woods, 409-428. 1875.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—The complainants, Skipwith Wilmer and August Richard, allege that they are the owners and holders of certain of the bonds known as first mortgage eight per cent. bonds of the Atlanta & Richmond Air Line Railway Company, which are secured by a deed of trust on all the property and franchises of the defendant company, and they file this bill in behalf of themselves and all other holders of similar bonds who shall be entitled to avail themselves of the benefit of the suit. The purpose and prayer of the bill is, that the trust deed, given to secure said bonds, may be so construed that the trustees therein named, or their substitutes to be appointed by the court, may be compelled to execute the trusts created by the deed of trust, by taking possession of said railway and appurtenances, and all property granted by the deed of trust, and selling the same at public auction for the payment of the principal and interest of all the bonds secured by said trust deed, and that pending the suit, some suitable person may be appointed receiver to take possession of said railway and all its property conveyed by the trust deed, with power to operate and manage said railway, and receive all its earnings and income during the pendency of the suit, and with such other power as to the court shall seem right and proper.

The cause now comes on for hearing upon the motion of the complainants for the appointment of a receiver as prayed in the bill. It is alleged in the bill that the defendant company is a corporation created by and existing under the laws of the states of Georgia, South Carolina and North Carolina, and having its principal office and place of business in Atlanta, in the state of Georgia. It further appears from the bill that, by an act of the legislature of Georgia, approved March 5, 1856, a railroad company, to be known as "The Georgia Air Line Railroad Company," was incorporated and authorized to build, equip and enjoy a railroad from Atlanta to the South Carolina state line, in the direction of Anderson court-house.

By an act of the general assembly of South Carolina, approved December 20, 1856, the Air Line Railroad Company of South Carolina was incorporated, with authority to construct a railroad from the line of the state of Georgia, in the direction of the city of Atlanta, to Anderson court-house, and thence to some point of connection with the Charlotte & South Carolina Railroad, in the direction of Charlotte, North Carolina, and to equip and enjoy the same. The seventh section of this act of incorporation provides that it shall and may be lawful for the said company to combine or unite with any other railroad company having the right so to do, and to consolidate the management of the companies so combining, if they shall deem it necessary, and to make any regulations for the use of or combination of the interest or management of said roads as the public good may require, or to them may seem meet.

By an act of the legislature of North Carolina, approved August 3, 1868, it was provided that the Air Line Railroad Company in South Carolina was authorized "to extend, construct, equip and operate its road within the limits of North Carolina, from any point on the South Carolina line to the town of Charlotte, in North Carolina."

These three acts being in force, the legislature of Georgia, by an act ap-

proved September 7, 1868, declared "that the Georgia Air Line Company be and they are hereby authorized to consolidate, combine or unite with any other railroad company or companies directly or indirectly connecting therewith, or to unite the management of said companies, upon such terms, conditions and provisions as shall be agreed upon by and between such companies so consolidated or uniting, and thereupon such consolidated or united companies shall be invested in this state with all the rights and privileges conferred upon, and be subject to all the restrictions imposed by the original charter of, the said Georgia Air Line Railroad Company, and the amendments thereto, with the right to adopt such other or modified corporate name, and to increase and diminish the number of directors now provided, or as shall be determined on and agreed upon by such companies." And the legislature of South Carolina, by an act approved September 18, 1868, entitled "An act to amend an act entitled an act to incorporate the Air Line Railroad Company in South Carolina," declared, section 2, "that if said company shall, as authorized by its charter, consolidate or unite with any other company or companies, it may adopt such other or modified corporate name and increase or diminish the number of directors now provided for as shall be deemed best and agreed upon by such companies."

In pursuance of the authority granted by these acts of the legislatures of Georgia and South Carolina, it is alleged that, on June 20, 1870, the Georgia Air Line Railroad Company and the Air Line Railroad Company in South Carolina, by an agreement in writing duly executed between said companies, were consolidated and united into one corporation, under the name of the "Atlanta & Richmond Air Line Railway Company," and from thenceforward became one body corporate under that corporate name, and the owner of all the property, and entitled to all the rights, privileges and franchises which had belonged to the two companies out of which it was formed.

It is further alleged that the Atlanta & Richmond Air Line Railway Company, having thus become the owner of all the property which had belonged to the two companies named, and being in need of a large sum of money to complete and equip its road, conveyed to trustees by deed of trust, "the entire railway of said company, extending from the city of Atlanta, in the state of Georgia, to the city of Charlotte, in North Carolina, together with all its franchises, lands, buildings, machinery, rolling stock, materials and other property, real and personal, wherever situated, and however held, and whether now owned or hereafter acquired; and also the annually accruing net income of said company," the purpose of which said deed of trust, and it so declared, was to secure the payment of four thousand two hundred and forty-eight coupon bonds of \$1,000 each, to be issued by the company, with interest payable semi-annually at the rate of eight per cent. per annum. It was made the duty of the trustees named in the deed of trust, upon default of payment of either the principal or interest of the bonds, to take possession of the trust property and its revenues, and administer the same, and to sell the property, or such part thereof, as might be necessary to pay the sum of money in default. The bonds secured by the deed of trust were duly executed and issued and negotiated by the Atlanta & Richmond Air Line Railway Company.

The bill further states that on the 1st of January, 1874, the company made default in the payment of its interest that day due, that the interest coupons were presented for payment at the offices of the company in New York and Atlanta, and payment thereof was refused. More than sixty days having elapsed from

the time of such default, the complainants, together with the holders of other two thousand three hundred and forty-two of said bonds, gave notice to R. A. Lancaster and Alfred Austell, the surviving trustees under said deed of trust, of the default in the payment of interest, and requested them to proceed and execute the trusts created by said deed, and take possession of the trust property and the revenues of the company, as authorized and required by the deed of trust, to sell the property and apply the net proceeds of the entire trust property to the payment of the principal and interest on the bonds secured by said deed of trust, as therein provided. Although five months have elapsed since the said request, the trustees have taken no steps towards the execution of said trusts, or the enforcement of the bondholders' rights under the deed of trust, but have utterly failed and neglected so to do.

It is further alleged that the Atlanta & Richmond Air Line Railway Company is managed, not so much in the interest of its bondholders and stockholders, as in the interests of the Richmond & Danville Railroad Company, whose president is also the president of the Atlanta & Richmond Air Line Railway Company; that it has been made subservient to the interests of the Richmond & Danville Company, greatly to its own injury and the damage of the complainants and other bondholders. It is also alleged that the Richmond & Danville Railroad Company claims to have some interest in the property covered by the deed of trust, and to have a lien therefor on said property, and that the complainants apprehend that the Atlanta & Richmond Air Line Company and the Danville & Richmond Company are acting collusively in regard to said lien, and that it is their intention to undertake to enforce it to the great wrong and injury of complainants and other bondholders.

It is unnecessary here to notice further the allegations of the bill. The motion is for the appointment of a receiver to take possession of the entire line of the defendant company's road, running from Atlanta, Georgia, to Charlotte, North Carolina, over portions of three states.

§ 295. *Where a trustee refuses to perform a trust, a court of equity will grant relief by a receiver or otherwise, irrespective of the question of ultimate loss.*

The first question which presents itself for solution is, Should there be a receiver for the property of the defendant company or any part of it? The rules which govern the discretion of courts in the exercise of this power are well settled. Where there is a trust fund in danger of being wasted or misapplied, a court of equity will interfere upon the application of any of the creditors, either in his own behalf or in behalf of himself and the other creditors, and, by the appointment of a receiver, or in some other mode, grant relief. *Jones v. Dougherty*, 10 Ga., 274. The appointment of a receiver is not necessarily predicated upon the apprehended loss of the debt. It would be sufficient to allege that the trustee appointed refused to perform the trust. *McDougal v. Dougherty*, 11 Ga., 586. Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right. *Jenkins v. Jenkins*, 1 Paige, Ch., 243. The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance. 2 Redf. on R'ys, 361.

To apply these well settled rules to the question in hand: As already stated, the trustees have, for more than five months, neglected, although requested, and

although the deed of trust made it their duty to do so, to take possession of the property of the defendant company. The bondholders have as clear a right to have executed that power of the trust deed, which requires the trustees to take possession of the property upon default in payment of interest, as any other covenant in the deed. If the trustees refuse to perform this duty, the *cestui que trust* has the right to apply to the court to compel them to do it, or appoint some one who will. And this right is independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms. It has been made to appear upon the hearing that the interest for January and July last is in default, amounting to \$339,840. It is also shown that upon an execution issued on the judgment of a court of the state of Georgia for little more than \$1,000, the railroad of the defendant company has been sold piece-meal in the several counties of the state of Georgia through which it runs.

§ 296. *Where the trust property had fallen into the hands of two different receivers responsible to three different courts, that fact of itself was a good reason for this court to appoint a receiver for the whole property if it had jurisdiction so to do.*

It is also shown that since the filing of the bill and the service of process in this case, and since the allowance of a restraining order, a suit has been instituted in the superior court of Fulton county, Georgia, in which a receiver has been appointed for so much of the property of the defendant company as lies within the state of Georgia; that suits have been instituted in the United States circuit court for North Carolina, and in the United States circuit court for South Carolina, since the service of process in this action, in which receivers have been appointed for the property of the company in these states respectively. It is true that the same person has been appointed receiver in North and South Carolina, but a different person is the receiver appointed by the state court in Georgia. Here are three distinct and independent courts claiming possession of different portions of the railroad and other property of the defendant company, and it is in the actual possession of two independent receivers living in different states and accountable to different tribunals.

The averment of the bill is, that this railroad property from Atlanta, Georgia, to Charlotte, North Carolina, is one inseparable and indivisible piece of property; that it is a portion of a great through route, and derives its chief value and business from that fact. The legislation already cited, of the three states through which it runs, shows that it was intended to be one undivided and unbroken line, and the deed of trust, which is the basis of this proceeding, covers the whole line of the road from one terminus to another. It is obvious that it would be a most unfortunate case that such a property should be held by two different receivers, accountable to three different courts. In fact, when we consider that a large part of the property of the company consists of rolling stock, which must necessarily pass from one end of the road to the other, and which must be used on the three divisions into which the road is divided by its administration in three different courts, it appears to be well nigh impossible to administer the affairs of the road and render accurate and satisfactory accounts. It is evident that such a divided control must result in crippling the operations of the road, destroying its business and reducing its receipts, and placing in jeopardy the security of its creditors. This unfortunate condition of affairs, resulting from the action of three independent courts, would of itself be, as it

appears to us, sufficient ground for the appointment of a receiver for the entire property by this court, if the power and jurisdiction of this court to do so is clear.

§ 297. *A single corporate body may be created by the concurrent legislation of two different states.*

First, then, Has this court the power to appoint a receiver for real property outside the limits of the state? Involved in this question is another, to wit: Is the Atlanta & Richmond Air Line Railway Company one corporation in Georgia, and another and distinct corporation of the same name in South Carolina, or is it the same corporate body in both states? It seems to me quite clear that the purpose of the legislation of Georgia and South Carolina, in reference to this corporation, already set out in this opinion, was to create a single corporate body. Pursuant to the provisions of the acts of these two states, the two original companies did consolidate and combine, they took a new name, and organized a new and single board of directors. Having done this, the new consolidated company, under its new name, and acting by its one president, has executed a single deed of trust, covering the entire line of railway from Atlanta to Charlotte, and including all the personal property which formerly belonged to the two companies that united to form the new one. It is clear that the legislation of the two states was passed to authorize the making of one corporate body out of two, and that the two corporate bodies so authorized have united, and have, ever since the 20th of June, 1870, the date of the consolidation, been acting as one company.

The only remaining question in this branch of the inquiry is, Could the legislatures of two different states unite to create one corporate body? This question is distinctly answered by the supreme court of the United States in the case of *The Railroad Co. v. Harris*, 12 Wall., 82. The court says: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one.

"The Philadelphia, Wilmington & Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland, Chief Justice Taney, in delivering the opinion of this court, said: 'The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the states of Maryland, Delaware and Pennsylvania, and which, by corresponding laws of the respective states, were united together, and form one corporation under the name and style of The Philadelphia, Wilmington & Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore.'" We reach the conclusion, then, that the Atlanta & Richmond Air Line Railway Company is one and the same corporate body in Georgia and South Carolina, and the legislation of North Carolina hereinbefore referred to shows that it has the same rights and functions in that state that it has in South Carolina.

§ 298. *The circuit court for the district in which a business corporation has its residence and chief place of business may appoint a receiver and take charge of its property as well without as within the district.*

The bill avers, and the proof shows, that this corporate body, existing in two states and owning property in three, has its residence and principal office at Atlanta, Georgia. The inquiry then recurs, Can this court, having obtained jurisdiction over the person of this corporate body, exercise jurisdiction over its real and personal property outside the limits of the state, by the appoint-

ment of a receiver to take possession of the entire property, both within and without the state?

There is a precedent for the exercise of such jurisdiction. In *Ellis v. The Boston, Hartford & Erie Railroad Co.*, 107 Mass., 1, the court appointed a receiver for the entire line of the defendant company's road, which extended from Boston, in Massachusetts, to Fishkill, in New York. It is well settled that realty out of the state may be reached by acting on the person. *Mitchell v. Bunch*, 2 Paige, Ch., 606; *Ramsey v. Brailsford*, 2 Dess., 587, note. In the case in Paige, it was held that if the person of the defendant is within its jurisdiction, the court has jurisdiction as to his property situated without such jurisdiction.

When the property is situated outside the territorial jurisdiction of the court the court may require assignments to be made by the defendant to the receiver. *Chipman v. Sabbaton*, 7 Paige, Ch., 47; *Cagger v. Howard*, 1 Barb. Ch., 369; Story on Conflict of Laws, § 463; *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 15 How., 243. As the property of the defendant company is one entire and indivisible thing, and as it is all covered by one deed of trust, there seems to be no good reason why this court should not appoint a receiver for the whole, even though a part of the property may extend into another state. The court having jurisdiction of the defendant can compel it to do all in its power to put the receiver in possession of the entire property. If other persons outside the territorial jurisdiction of this court have seized the property of defendant, the receiver may be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession, but that is no reason why we should hesitate to appoint a receiver for the whole property. We think the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put the receiver of this court in possession.

§ 299. *When a court has obtained constructive possession of the trust property, and other courts afterwards obtain actual possession, the first court has jurisdiction.*

Finally, it is objected that the superior court of Fulton county, Georgia, and the United States circuit courts of South Carolina and North Carolina, respectively, have taken jurisdiction of the property of the company within their respective states, and their receivers are in possession, and this court ought not to interfere by the appointment of a receiver of its own.

The record shows that the bill in this case asking this court to undertake the administration of this trust property, and to take possession of it by its receiver, was filed on the 30th of October, 1874. It is shown that service was made upon the defendant corporation on the 31st of the same month, and notice of the motion now on hearing was served on the same day. It further appears that on the 5th of November, upon the application of the complainants, and upon the showing that there appeared to be danger of irreparable injury from delay, a judge of this court directed that, upon the execution of a bond by complainants, with sufficient sureties, in the sum of \$5,000, conditioned according to law, a restraining order issue enjoining and restraining the Atlanta & Richmond Air Line Railway Company, its officers and agents, from handing over or delivering possession of said railway or its appurtenances, or any of its other property, to any person except a receiver appointed by this court in this suit.

The bond was given by the complainants as required by the court, and the

restraining order was issued, and on the 9th of November served on the Atlanta & Richmond Air Line Railway Company. The case in Fulton superior court was not filed until November 10th, and no prayer was made for a receiver until Garner, a defendant in that case, applied for one in his answer, which was filed on November 20th. The suits in the United States circuit courts of South and North Carolina were not commenced until the 16th of November.

Upon this state of facts, which court first acquired jurisdiction of this trust property? Is actual seizure of the property necessary to the jurisdiction of the court? In my judgment it is not. In this case I think the jurisdiction of the United States circuit court for the northern district of Georgia first attached to the property, because the suit in that court was first commenced and service of subpoena made, and because, 1. One of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill; and 2. Because, by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any person except a receiver appointed by this court in this cause, the court acquired constructive possession, and from the moment of the service of the restraining order the property was *in gremio legis*. I think these positions are sustained by the authorities.

I subjoin a reference to a number of cases, in all of which the subject under consideration is discussed, and in some of which the precise point is decided and the views above expressed are sustained. *Smith v. McIver*, 9 Wheat., 532; *Wallace v. McConnell*, 13 Pet., 151; *Peck v. Jenness*, 7 How., 624; *Williams v. Benedict*, 8 How., 107; *Wiswall v. Sampson*, 14 id., 52; *Taylor v. Carryl*, 20 id., 583; *Green v. Creighton*, 23 id., 90; *Freeman v. Howe*, 24 id., 457 (§§ 255–260, *supra*); *Chittenden v. Brewster*, 2 Wall., 191; *Memphis v. Dean*, 8 id., 64; *Taylor v. Taintor*, 16 id., 370; *New Orleans v. Steamship Co.*, 20 id., 392, 393; *Atlas Bank v. Nahant Bank*, 23 Pick., 489; *Wadleigh v. Veazie*, 3 Sumn., 165; *Ex parte Robinson*, 6 McL., 355; *Bell v. Ohio Life & Trust Co.*, 1 Biss., 260; *Bill v. The New Albany Railroad Co.*, 2 id., 390; *Parsons v. Lyman*, 5 Blatch., 170 (§§ 322–328, *infra*); *Stearns v. Stearns*, 16 Mass., 171; *Conover v. The Mayor*, 25 Barb., 513; *Clepper v. The State*, 4 Tex., 242; *Thompson v. Hill*, 3 Yerg., 167; *Bank v. Rutland Railroad Co.*, 28 Vt., 478; *Merrill v. Lake*, 16 Ohio, 405; *Ex parte Bushnell*, 8 Ohio St., 601; *State v. Yarbrough*, 1 Hawks, 78; *Gould v. Hays*, 19 Ala., 448; *High on Rec.*, 38, 39, 40, 41, and note. Especial attention is called to the cases of *Wiswall v. Sampson*, 14 How.; *Chittenden v. Brewster*, 2 Wall., and *Bill v. The New Albany Railroad Co.*, 2 Biss., *supra*.

An examination of the cases cited will show that actual seizure of property has not been considered necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought. The commencement of the action and service of process, or, according to some of the cases, the simple commencement of the suit by the filing of the bill, is sufficient to give the court jurisdiction, to the exclusion of all other courts.

In this case, not only was the suit begun and process served before the commencement of any other suit, but the defendant railway company was actually enjoined by the order of this court from yielding possession of the trust property to any one except a receiver appointed by this court in this case. In my judgment, this restraining order gave this court constructive possession of the trust property, and a subsequent seizure of the same by any person on the

order of any court whatever, in a suit subsequently begun, was a contempt of the process and jurisdiction of this court.

If this court, upon the bill filed in this case, has the power to take possession of the entire property granted by the trust deed, as we have already decided it has, then the filing of the bill asking this court to take possession of and administer the trust property, and the service of process, excluded the jurisdiction of all other courts to take possession of and administer the same property or any part thereof. Other questions than those noticed in this opinion have been argued at the bar, but it is not necessary to decide them in passing on this motion.

I am of opinion that this court has jurisdiction to appoint a receiver for the entire property covered by the trust deed, and to administer the property for the benefit of all persons interested in the trust; that the jurisdiction of this court over the entire trust property attached before that of any other court; that all parties necessary to the hearing of this motion are before the court; that the bill and the evidence submitted establish a proper case for the appointment of a receiver, and the facts brought to the knowledge of the court imperatively demand its intervention; the interest of all parties requires that our jurisdiction, being thus exclusive over the subject-matter, should be exercised, and that the motion for the appointment of a receiver for the whole trust property should be sustained.

Under this opinion a receiver was appointed, who, having failed to get possession of the trust property in Georgia, applied May 24, 1875, to the United States circuit court for Georgia for a writ of assistance.

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—This is a bill filed on behalf of first mortgage bondholders of the Atlanta & Richmond Air Line Railway Company, praying for a sale of the railway and appurtenances, and for a receiver to take possession of the property pending the suit. A receiver, Mr. John H. Fisher, was appointed by Circuit Judge Woods, on the 9th of December last. On proceeding to take possession of the property, the receiver found a large and important portion of it, to wit, the depot and terminus in Atlanta, and the railway line in Fulton, and some other counties in Georgia, in the possession of one Lemuel P. Grant, as a receiver appointed by the superior court of Fulton county, a court of the state of Georgia having equity jurisdiction. Grant refused to surrender possession, and Fisher, under an advisory order of Erskine, district judge, applied to the superior court of Fulton county for an order directing its receiver to surrender the property. This application was also refused. Fisher, the receiver appointed by this court, now applies by petition for a writ of assistance to put him in public possession of the property, and for an attachment as for a contempt against Grant, and other officials and directors of the railway company, for conspiring to keep the property out of the possession of the officers of this court. To this petition several answers have been filed by the parties implicated, and the question is thus presented whether this court can, and if it can, whether it will, take the property in question out of the possession of a receiver appointed by a state court. Under ordinary circumstances, such a proposition would not be listened to for a moment. But the complainants and the receiver of this court rely on the special circumstances of the case as taking it out of the ordinary rule. Those circumstances may be briefly stated as follows:

The bill in this case was filed October 30, 1874, and a copy and notice of motion for injunction and receiver were served on the railroad company the next day. On the 5th of November, Judge Erskine granted a restraining order, which, on the 9th of the same month, was served on the company and on Grant, then a director of the company, appointed on behalf of the city council of Atlanta, of which he was a member. On the 11th it was served on Buford, the president, and on Sage, the general superintendent, and was brought to the notice of Garner, a director. As before stated, the application for a receiver was not decided until the 9th of December, 1874.

Mean time other proceedings had taken place in the state courts, and especially in the superior court of Fulton county, which produced the complications that have arisen.

In December, 1866, one Samuel B. Hoyt recovered a judgment in the Fulton county court against the Georgia Air Line Railway Company, of which the Atlanta & Richmond Air Line Railway Company is the legal successor by change of name, for the sum of \$1,000 and costs, and *fiery facias* was duly issued under the laws of Georgia, not only in Fulton county, but Gwinnett, Habersham and Hall counties, and several levies were made on the railroad line in April, August and September, 1874, and the road was sold in distinct parcels to one William A. Russell. The sales were severally made in June, September and October, 1874. On the 5th of November, Russell transferred his interest to Garner, a director, as above stated, for the whole line of railroad in Fulton, Gwinnett and Hall counties. Garner was put into possession by the sheriff on the 9th of November, 1874. On the next day, the 10th, the Atlanta & Richmond Air Line Railway Company, by its managing director, P. A. Welford, filed a bill in the superior court of Fulton county against Hoyt, the judgment creditor, Russell, the purchaser at sheriff's sale, Garner, the assignee, etc., to prevent their proceeding to take possession of the road. On the 20th of November, Garner filed a cross-bill in the same court, asking for the appointment of a receiver, which resulted in the appointment of Grant, on the 21st, and his taking possession on the 26th of the same month. Grant had resigned his position as director of the company on the 11th of November.

It thus appears that the bill in this court was filed before that in the superior court of Fulton county, but that a receiver was first appointed by that court, and that he was in possession when the appointment of receiver was made by this court. It also appears that the object of the two suits was different; in this court, it being the foreclosure of the mortgage and the sale of the property to satisfy the same, the possession sought being auxiliary to the main purpose; in the state court, the object was to set aside the proceedings and sale under the judgment of Hoyt, and to prevent Garner from keeping possession of the road. On the 2d of January, 1875, the complainants in this court filed an amended bill, making parties of Hoyt, Russell, Garner and Sage, and alleging that the proceedings in the superior court of Fulton county were collusive, and intended to frustrate the proceedings of this court. But suppose that the allegations of the amended bill are true, can this court arrest proceedings in a state court on the ground of their collusiveness? Must not the state court itself be applied to? We cannot assume or entertain the proposition that the state court will not do justice in matters within its jurisdiction. We are bound to suppose that it will not allow a collusive use of its process to be made by parties, but that it will set aside and declare null all such fraudulent proceedings.

§ 300. *The rule that priority in assuming jurisdiction excludes the jurisdiction of all other courts does not apply where the objects of the two suits are different.*

Then the question remains pure and simple, Does the priority of commencing suit in this court for the foreclosure and sale of the mortgaged premises give the court constructive possession of the property, so as to nullify the subsequent possession taken by the state court, the respective objects of the two suits being different? It is too well settled to admit of controversy, that where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases. Thus an action of debt on a bond, an action of ejectment on the mortgage given to secure it, and a bill in equity to foreclose the equity of redemption, may be pending at the same time unless prohibited by some statutory regulation. The land mortgaged may be seized in execution by the sheriff in an action at law, even while the ejectment or the bill to foreclose is pending.

§ 301. — *nature of a proceeding to foreclose.*

A bill to foreclose is a personal proceeding, although it has reference to a specific thing. Its object is to put an end to an existing equity, and to procure a sale of the mortgaged premises. Possession may be taken in the course of the proceeding, but until it is taken, can it be said that the property is sacred from the touch of other persons or courts?

The present case, then, is resolved to this: Had the Fulton county court power to appoint a receiver and place him in charge of the property, whilst a bill to foreclose was pending in this court; or was it an interference with the jurisdiction of this court? It is perfectly evident that the controversy before that court is a different one from the controversy before this court. There it is a question of the validity of a sale under execution, and of the possession given by the sheriff in pursuance thereof; and that question arises between the Atlanta & Richmond Railway Company and the assignee of the purchaser. Here it is a question of the rights of bondholders, under a mortgage given by the Atlanta & Richmond Air Line Railway Company and the company, and arising between the bondholders and the company, and its officers and employees.

§ 302. — *in such cases the question is, which court first acquired jurisdiction over the property.*

The controversy not being the same, nor the parties the same, there is no conflict of jurisdiction as to the question or cause. But, inasmuch as both controversies have ultimate respect to the possession of the railroad of the Atlanta & Richmond Air Line Railway Company, there has arisen a conflict of jurisdiction as to the thing or subject-matter. It is important to know, therefore, whether this court had jurisdiction over the subject-matter, namely, the railroad, when taken possession of by the receiver of the Fulton county court, so as to make that taking an invasion of the jurisdiction and powers of this court. If it had, it will enforce that jurisdiction and assume the actual possession to which it gives the right. If it had not, then it will not interfere with the actual possession of the receiver of that court, though the rights represented by the litigants in this court be superior to those of both litigants in the state court, as those rights can be asserted when the possession of the state court has ceased. The reason that it will not interfere in such case is, that interference

might create a collision between the two courts, which would be unseemly and contrary to the comity which should exist between them. The two courts are co-ordinate in jurisdiction, neither being superior to the other, and both being charged in the respective cases before them with the due administration of the laws of the state of Georgia.

The test, I think, is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close and judicial possession has ceased.

§ 303. *Jurisdiction over property is acquired only by seizure.*

Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction. The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts, and we must respect the possession and jurisdiction of the sister court. We cannot take the property out of its hands unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied.

Our views may be somewhat variant from those of Judge Woods, as expressed by him when the receiver was appointed. That question was different from the one now before us, which relates to the powers of that receiver to interfere with the possession of a portion of the road, in the hands of another receiver. Our decision does not necessarily conflict with his order, although our views may differ from his as to the power of the receiver. And in differing from Judge Woods we do so with much respect for his opinion. The question must be admitted to be one of some nicety; but we prefer that course which avoids collision with a state court when it coincides with our own convictions as to the law. The authorities on the subject have been somewhat carefully consulted, especially the following: *Smith v. McIver*, 9 Wheat., 532; *Wallace v. McConnell*, 13 Pet., 151; *Williams v. Benedict*, 8 How., 111; *Hagan v. Lucas*, 10 Pet., 400; *Payne v. Drew*, 4 East, 538; *Taylor v. Carryl*, 20 How., 583; *Pulliam v. Osborne*, 17 id., 471; *Buck v. Colbath*, 3 Wall., 334; *Watson v. Jones*, 13 id., 679.

ERSKINE, D. J., concurred.

BLACK v. SCOTT.

(Circuit Court for Ohio: 9 Federal Reporter, 186-191. 1881.)

Opinion by SWING, D. J.

STATEMENT OF FACTS.—The bill states substantially that John Scott, on the 2d day of August, 1875, executed and delivered to Miner T. Ames and John M. Carse his twenty-one promissory notes, payable to the order of said Ames & Carse, with eight per cent. interest — interest payable annually; said notes being for different amounts, payable at different dates, the last six of which were for \$1,000 each, and payable November 1, 1877, February, 1878, May 1,

1878, August, 1878, November, 1878, and February 1, 1879; that said Scott, on the day of the execution of the notes, executed to complainant a deed of trust, to secure the payment of said notes; that the four notes due May 1, 1878, August 1, 1878, November 1, 1878, and February, 1879, were, before either of them became due, to wit, about the 10th day of September, 1877, for a full and valuable consideration, indorsed and delivered by said Ames & Carse to the Humboldt Safe Deposit & Trust Company, a corporation of Pennsylvania, which now holds and owns the same, and about the same time and before the maturity thereof, for a valuable consideration, the said Ames & Carse indorsed and delivered to the National Bank of Chicago, a corporation of the state of Illinois, the note due February 1, 1878, and indorsed and delivered to said John M. Carse, before maturity, and for a valuable consideration, the note for \$1,000, due November 1, 1877, and who are still the owners and holders thereof; that the said John W. Scott, on or about the 23d day of October, 1877, made an assignment of all his property to Charles A. Coble, a resident of said Athens county, who has duly accepted such trust and qualified as said assignee; that complainant is a resident of Chicago, and state of Illinois; that John M. Carse is a resident of Illinois; that the Humboldt Safe Deposit & Trust Company is a corporation and resident of Pennsylvania; that the Union National Bank is a corporation and resident of the state of Illinois; that said John W. Scott is a resident of Athens county, Ohio; and that John M. Grace is a resident of Ohio. Several other persons are made parties, all residents of Ohio.

The prayer of the bill is for an account of the amount that may be due on the several notes, and that John W. Scott may be decreed and ordered to pay the same; and that, in default of payment, the real estate included in the deed may be ordered to be sold, as upon judgments and executions at law, for the payment of the same. Subpœnas in chancery were issued, and the marshal returned, as to John W. Scott, "Served on John W. Scott by leaving a true copy thereof at his usual place of abode, with G. C. Coble, an adult person;" and Charles A. Coble was served personally. The defendant John W. Scott files a plea to the jurisdiction, in which he alleges that by reason of the fact that he, at the time, nor since the bringing of the suit, was not a citizen of the state of Ohio, this court has no jurisdiction.

The defendant Charles A. Coble files his plea, in which he alleges that this court has no jurisdiction, because John W. Scott, before the bringing of this suit, had assigned all his property, including the lands in the deed, to him, for the benefit of his creditors; that he accepted the trust, and qualified; that the probate court of Athens county, having exclusive jurisdiction of the trust created by said deed, ordered and adjudged, long before the bringing of this suit, that the defendant should proceed and sell the real estate embraced in the petition in this case, as well as all other, and convert it into money, which order and judgment remain in full force, and binding upon the defendant, and that he was, and now is, engaged in trying to sell said real estate; that the real estate is of greater value than the amount of the complainant's claim; that the property would be insufficient to pay all the indebtedness of said John W. Scott; that the real estate, at the commencement of this suit, was in the custody of the law and of the probate court, subject to its order, and this court had no jurisdiction thereof, or of this suit.

The plaintiff has set down these pleas for argument upon their sufficiency. It is objected by the plaintiff that these pleas are insufficient, for the reason that

they do not conform to the requirements of rule 31; that a plea shall not be allowed to be filed unless upon a certificate of counsel; that in his opinion it is well founded, in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay, and that it is true in point of fact. Neither of these pleas have the required certificate of counsel or affidavit of the defendant, and would therefore be adjudged insufficient; but inasmuch as the court would permit them to be amended or supplemented in this respect, the plaintiff has consented to their hearing as if they were accompanied by the necessary certificate and affidavit.

§ 304. *In suit to enforce a lien against the property of a non-resident defendant, jurisdiction may be acquired by service by publication under R. S., sec. 738.*

We will examine them separately. *First*, the plea of John W. Scott. The allegation of this plea is that at the time, nor any time since, the complainant exhibited his said bill in this honorable court, he was not a citizen of or within the state of Ohio, and therefore the court has no jurisdiction. The first section of the judiciary act provides that no civil suit shall be brought before the circuit court of the United States against any person by any original process or proceedings in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding. The bill alleges that the defendant is a citizen of Ohio, and the return of the marshal is that he was served by leaving a copy of the subpoena at his usual place of abode, in Ohio. The bill also alleges that the plaintiff is a citizen of Illinois, and it alleges the transfer of the notes for a valuable consideration, before due, to parties who were citizens of Pennsylvania and Illinois; that these notes are due and unpaid, and that since their execution and that of the deed, John W. Scott had assigned all his property for the benefit of his creditors. The bill prays an account, and an order that the defendant Scott pay, and in default that the court order the property to be sold.

Section 738 provides that "when any defendant in a suit in equity to enforce any legal or equitable lien or claim against any real or personal property within the district where the suit is brought is not an inhabitant of nor found within said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day therein to be designated. And the said order shall be served on the absent defendant, if practicable, wherever found; or, where it is impracticable, publication may be made. And, upon proof of the service or publication, it shall be lawful for the court to entertain jurisdiction of such suit in the same manner as if such absent defendant had been served with process within the district. But the adjudication shall affect the property of such defendant within such district only."

The general nature of this suit is clearly one to enforce a lien against real estate within this district. The plaintiff is a citizen of Illinois, and the defendant, in whom the legal title is vested, is a citizen of Ohio. The court has clearly, then, jurisdiction of the subject-matter, and the party in whom the legal title rests; and the fact that one who may be a proper party may not be an inhabitant of the state or a citizen of it, or may not be found within it, cannot oust the jurisdiction, for under section 738 he may be served personally out of the state, or may be brought in by publication. The plea, therefore, of the defendant John W. Scott is adjudged insufficient.

§ 305. *An assignment in insolvency does not cover property covered by a specific lien.*

The plea of the defendant Charles A. Coble substantially states that John W. Scott, before the bringing of the suit, had made an assignment of all his property, including that described in the bill, to him for the benefit of his creditors; that he had accepted the trust, and had qualified before the probate court of Athens county, Ohio, and had procured an order for the sale of said property, and was proceeding to sell the same; and that by virtue of these proceedings the probate court had acquired complete and exclusive jurisdiction of the subject-matter of this suit, and therefore this court cannot entertain jurisdiction of this cause. The proceedings set out in the plea were proceedings under the insolvent laws of the state, which provide for the manner of administering property assigned for the benefit of the creditors. Such assignments in nowise affect the legal and equitable liens which existed against the property at the date of the assignment. The persons in whose favor these liens exist are not made parties to the proceedings by the assignee to sell the property, and certainly no orders of the court affecting their rights would be binding upon them, unless they were parties thereto. *Ray v. Norseworthy*, 23 Wall., 128. The plea does not allege that the plaintiff was before the court in said proceedings, by being made a party thereto, but it is claimed only that by the proceedings and order of sale the probate court acquired exclusive jurisdiction, so that this court has no jurisdiction to maintain this suit.

§ 306. *Though an execution from a federal court will not reach property in the course of administration by a state court, yet this does not apply to property covered by a specific lien.*

It is certainly very clear that all the elements of jurisdiction of the circuit court of the United States are alleged in this bill. It is a controversy between citizens of different states. The amount exceeds \$500, exclusive of costs. The real estate and the principal party in interest are in the district in which the suit is brought. None of these allegations are controverted by this plea, but it is sought to defeat the jurisdiction solely upon the ground of the assignment, and the proceedings in the probate court to administer it. The question presented by this plea is not whether, when property has been seized by operation of the insolvent laws of a state, and is being administered by her courts for the benefit of creditors, this court can take possession of the same property and administer it. It has been held by the supreme court of the United States that in such cases the property could not be seized on execution from this court. *Williams v. Benedict*, 8 How., 107; *Bank of Tennessee v. Horn*, 17 How., 160. But it is whether this court, in a case where, by the constitution and laws, it has jurisdiction, can be prevented by an assignment and proceeding under it from entertaining jurisdiction and determining the rights of the parties. In each of the last cases referred to, the court recognize the right of the court to proceed to judgment, but determine that no execution could be levied on the property. And there are numerous cases in which jurisdiction has been maintained in the federal courts against administrators, while the estate was in process of settlement by the state courts, the rights of the parties ascertained and fixed, and their satisfaction to be made under the laws of the state. But in this case the property which is sought to be made applicable to the satisfaction of the decree, if one should be rendered, is property which had been set apart by the owner especially for that purpose, and which the assignment could in no way affect, but upon which the plaintiff has a specific lien; and it was held by

the supreme court in *Union Bank of Tennessee v. Jolly*, 18 How., 503, that "the law of a state, limiting the remedies of its citizens in its own courts, cannot prevent the citizens of other states from suing in the courts of the United States, in that state, for the recovery of any property or money there to which they may be legally or equitably entitled." *Suydam v. Broadnax*, 14 Pet., 67; *Hyde v. Stone*, 20 How., 170 (§§ 589–591, *infra*). But it is not necessary now to determine whether this court can, in case of a decree in favor of the plaintiff, proceed to a sale of the real estate described in the deed for its satisfaction. It is enough to say that the bill prays an account, and for a decree for the amount which may be found due, and for this purpose it is very clear to us that this court has jurisdiction, notwithstanding the proceedings in the probate court. *Union Bank of Tennessee, supra*; *Payne v. Hook*, 7 Wall., 425; *Yonley v. Lavender*, 21 Wall., 276. This plea must, therefore, also be adjudged insufficient.

WALKER v. FLINT.

(Circuit Court for Missouri: 2 McCrary, 341–344. 1881.)

Opinion by TREAT, D. J.

STATEMENT OF FACTS.—This is an action of ejectment, in which the plaintiff has set out with great particularity his deraignment of title, through proceedings in partition, to which the Life Association of America became a party. The final decree in said partition suit allotted to the plaintiff the premises in dispute. Said decree was entered in June, 1877, and duly recorded.

In July, 1878, the Life Association of America destroyed the fence previously erected by plaintiff along the division line of the lots assigned to him by the decree in partition, and erected a building partly upon plaintiff's property. Said association thereafter leased said building to the Flints and Coans (parties defendant). Suit for the dissolution of said association was instituted October 13, 1879, in the proper state court, which ripened into a final decree on November 10, 1879, whereby the title to all of the property of said association vested absolutely in Relfe, the state superintendent. Thereupon the said Flints and Coans attorned to said Relfe.

The plaintiff in this action made the defendants in possession and said Relfe the defendants to the suit. A motion was subsequently made to dismiss as to said Relfe, which was resisted by him. The court overruled the motion, on the ground that as the landlord might, under the Missouri statutes, make himself a party, and that as the plaintiff had chosen to bring him in, it would be idle to dismiss as to him, and then have him take leave to appear *instanter*. Now, said landlord being defendant of record, appears specially and moves to dismiss the suit on the ground that the premises in dispute are *in custodia legis* of the state court through his tenants and himself, as a state officer, in whom there has been vested by operation of law the title, whatever it may have been, of said dissolved association. The motion is supposed to rest on the doctrine stated in *Taylor v. Carryl*, 20 How., 584; *Freeman v. Howe*, 24 How., 450 (§§ 255–260, *supra*); *Buck v. Colbath*, 3 Wall., 334; *Thompson v. Scott*, 4 Dill., 508; *Conkling v. Butler*, 4 Biss., 22; *Wiswall v. Sampson*, 14 How., 52; *Peale v. Phipps*, 14 How., 368, and other cases cited. The present suit was brought in this court after said Relfe had become vested by decree of the state court with the title of the Life Association, and after the attornment to him by the tenants in possession.

§ 307. *A question of jurisdiction cannot be raised on a motion to dismiss, unless the defect appears on the face of the record.*

The technical question exists as to the mode of proceeding, viz.: Can a motion to dismiss raise the question desired to be presented? If there appears on the face of the record that the court had no jurisdiction, a motion to dismiss would be proper. But other facts have to appear in this case to raise the jurisdictional question,—such as the proceedings in the state court, etc.—which facts are stated at length in the motion and supplemented by the state record, etc. Hence the question should come before the court through a plea in abatement. The parties, however, to avoid technicalities, costs and delay, assert that the question may be considered as on a proper plea in abatement.

§ 308. *State and federal courts cannot lawfully interfere with each other where each is acting within legal limits.*

This court has had occasion, within the past year, to express its views upon supposed conflicts of jurisdiction between state and United States courts in like cases. *Levi v. Columbia Life Ins. Co.*, 1 Fed. R., 206. The rule is that when a state court has, through any of its officers, custody of property, a United States court will not interfere with said custody, and, on the other hand, will not permit interference with its own custody. That rule is essential, under our complex system of government, to due harmony of administration, and to avoid unseemly conflicts. It rests not on comity alone, but on the true theory of our governmental system, state and federal. There is to be no interference, one with the other, where each is acting within legal limits; but, on the other hand, neither is to transcend legal or constitutional limits, or deprive a party of his constitutional rights.

§ 309. *Property in hands of an officer of another court, not necessarily in the custody of that court.*

It is often as difficult to ascertain the precise limits to be observed under the rules just stated, as it is to reconcile adjudications had. The cases above cited and the two cases of *Payne v. Hook*, in the United States supreme court, seem not to be in accord. Whether so or not, the case before the court is free from such embarrassment. The rights of all parties had been settled by the partition decree in the state court, despite which one had become a trespasser on the premises of the other. Because the trespasser passed into liquidation under a state law, and his tenants who were co-trespassers attorned to the state liquidator, the real and adjudicated owner, being a citizen of another state, could not be thus deprived of his constitutional right to be heard in this court. The point decided is, not that of interference with the undoubted possession, rightfully, of property by the officer of another court, but that of an attempt to oust this court of jurisdiction by the attornment of trespassers to such trespassing officer.

The motion to dismiss is overruled. If a plea of abatement were interposed, embodying the statement of facts contained in the motion to dismiss, a demurrer thereto would be sustained.

SHELBY v. BACON.

(10 Howard, 56-71. 1850.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case comes before us from the circuit court of the eastern district of Pennsylvania, on a certificate of a division of opinion

between the judges. The complainant, who is a citizen of Kentucky, filed his bill against John Bacon and others, assignees of the late Bank of the United States under the charter from the state of Pennsylvania. The bank, being in a failing condition, executed assignments of its assets for the benefit of its creditors, and of certain creditors of the Bank of the United States chartered by congress (3 Stats. at Large, 266). The complainant represents himself to be a creditor of the late bank to a large amount, which is shown by judgments recovered in the "district court" for the city and county of Philadelphia, and in the commercial court of New Orleans. That, on application to the trustees aforesaid, they refused to pay the said judgments or any part of them, although they have funds in their hands or under their control to pay the debts of the bank, etc.

The defendants pleaded to the jurisdiction of the court. They admit the trust as alleged, and aver that the assignments were recorded as required by the acts of Pennsylvania; and they aver that the court of common pleas of the city and county of Philadelphia has ample power to enforce the trust, in regard to the rights of all parties claiming an interest therein. That the defendants under those laws, at different periods down to the 1st of January, 1847, filed their accounts, duly verified, "of their receipts and disbursements, with the prothonotary of the said court," which were sanctioned by the court. That under its direction they have vested large sums of money to await the result of pending litigations. And they submit to the court whether they ought to be compelled to answer.

On the hearing the judges were opposed in opinion on the following points: 1. Whether the facts stated in the plea to the amended bill filed by John Bacon, Alexander Symington and Thomas Robins, deprive the court of jurisdiction of the case; and whether the plea to the plaintiff's bill is sufficient and ought to be allowed. 2. Whether the facts stated in the plea to the amended bill filed by the defendants James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope, and Thomas S. Taylor, deprive the court of jurisdiction of the case, and whether the said plea is a sufficient plea to the plaintiff's bill, and ought to be allowed.

There is no principle better settled than that, where two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other. And the question we are now to consider is, whether the procedure in the court of common pleas, above stated, under the special acts of Pennsylvania, abates the suit of the plaintiff.

§ 310. *In proceedings in a court under a statute, all material requirements must be complied with to give the court jurisdiction.*

Can the proceeding stated in the plea be considered a suit? The revised act of Pennsylvania, of the 14th of June, 1836, entitled: "An act relating to assignees for the benefit of creditors and other trustees," requires in the first six sections the assignment to be recorded in thirty days, and the assignment being voluntary, "the assignees shall file an inventory or schedule of the estate or effects so assigned, which shall be sworn to;" on which it is made the duty of the court to appoint appraisers, who shall return an inventory and appraisal; on the return of which the assignees are required to give bond "to the commonwealth, that they will in all things comply with the provisions of the act of assembly, and shall faithfully execute the trust confided to them," etc.

The defendants aver "that, having in part executed the trust so as above committed to them, they did, on the 7th of January, 1843, file in the office of the prothonotary of the court of common pleas aforesaid an account, duly verified, of their receipts and disbursements," etc. And several other and similar returns are averred to have been made.

By the seventh section of the act, the court are authorized, on the application of any person interested, to issue a citation to any assignee or trustee for the benefit of creditors, whether appointed by a voluntary assignment or in pursuance of the laws relating to insolvent debtors, etc., requiring him "to appear and exhibit, under oath or affirmation, the accounts of the trust in the said court," etc. The ninth section authorizes the court to give notice, by publication, when the accounts will be acted on, that objections to them may be made. And by the eleventh section, where a trustee has neglected or refused, when required by law, to file a true and complete inventory, or to give bond with surety, when so required by law, or to file the accounts of his trust, "it shall be lawful for the court (of common pleas) to issue a citation, etc., to show cause why he should not be dismissed."

Now it does not appear from the plea that the assignees ever filed the inventory of the assets in their hands with the prothonotary of the court, as required by the first section, and it would seem that not only the inventory must be filed, where the assignment is voluntary, to give jurisdiction to the court, but also that it must be sworn to, an appraisement of the trust property made and returned, and bond given by the assignees. This is a proceeding under a statute, and to bring the case within the statute every material requirement of the act must be complied with. And if the above requisites have not been observed, it is not perceived how the court could take jurisdiction of the case. In the plea it is stated that accounts have been filed by the assignees at different times, and moneys distributed among the creditors. But how can this give jurisdiction? The court has no evidence of the extent and value of the trust, and no bond of the assignees faithfully to account. If these important steps have been taken, they should have been stated in the plea; as it must show, to be effectual, that the court had jurisdiction of the whole matter. The plea is defective in not setting out the above requirements.

§ 311. *Though a state court has jurisdiction of the subject-matter, a non-resident, not a party in the state court, may sue in the federal court upon the same matter.*

But if the plea had been perfect in this respect, it would not follow that the complainant could not invoke the jurisdiction of the circuit court. He being a non-resident has his option to bring his suit in that court, unless he has submitted or is made a party, in some form, to the special jurisdiction of the court of common pleas.

It appears from the bill that the assignees have refused to allow the claim of the plaintiff, or any part of it. To establish this claim as against the assignees the complainant has a right to sue in the circuit court, which was established chiefly for the benefit of non-residents. Not that the claim should thus be established by any novel principle of law or equity, but that his rights might be investigated free from any supposed local prejudice or unconstitutional legislation. On the most liberal construction favorable to the exercise of the special jurisdiction, the rights of the plaintiff, in this respect, could not, against his consent, be drawn into it.

§ 312. *Proceedings in a state court to adjust rights of creditors, etc., held not a suit.*

It is difficult to define the character of this procedure under the Pennsylvania law. There being no court of chancery in that state, statutory provision was made for the execution of trusts. The statutes adopt some of the principles of chancery, but do not invest the court with the powers of a court of equity which are necessarily exercised in administering trusts. It is not strictly a proceeding *in rem*. The proceeding is intended to adjust the rights of debtors and creditors of the bank, beyond the jurisdiction of the state of Pennsylvania. Citizens residing, perhaps, in a majority of the states of the Union, are debtors or creditors of the bank. It is difficult to perceive by what mode of procedure the state of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated. From the plea, it does not appear that any notices have been given, or citations issued, as authorized by the statute. Nothing more seems to have been done by the assignees than to file their accounts, have them referred to auditors, and finally sanctioned by the court. Whether this procedure is evidence of a faithful discharge of the trust so far as the accounts have been so adjusted, it is not necessary to inquire. We suppose that it could not be contended that fraud or collusion might not be shown to avoid the proceeding before any tribunal having jurisdiction.

No suit seems to be pending in the common pleas. The action of the assignees appears to be voluntary, for their own justification, and not in obedience to the order of the court. By the statute, any person interested may, on application to the court, obtain a citation to the assignees to appear and answer. But this is nothing more than the ordinary exercise of a chancery power to compel them to account. And it is only an exercise of jurisdiction over them from the time the bill is filed and a notice served, or the application for a citation is made on due notice. If no such proceeding is had, the assignees, it would appear, file their accounts or omit to do so at their pleasure. This is not in the nature of a bankrupt or insolvent procedure. Neither the person nor the property of the assignor is entitled to exemption, under the statute, from the claims of creditors. But in such a proceeding notice to the creditors and a schedule of debts, as well as assets, are required by law.

Under the laws of Pennsylvania, a debtor may assign his property for the benefit of his creditors, giving a preference to some of them over others. This may be done by the common law. The assignment made by the late Bank of the United States specifies different classes of creditors, but none are excluded from the benefits of the assignment. The assignees admit, in their plea, that they have vested a large amount of assets to await the determination of certain suits still pending. Suppose they had reduced to possession the whole amount of the assets of the bank, and held them ready for distribution, could it be doubted that the complainant would have a right to file his bill in the circuit court, not only to establish his claim against them, but also for a proportionate share of the assets? The circuit court could not enjoin the court of common pleas, nor revise its proceedings, as on a writ of error; but it could act on the assignees, and enforce the rights of the plaintiff against them. The debts due by the bank being ascertained, and the amount of its assets, after the payment of all costs, the equitable distribution would not be difficult.

Not doubting that the complainant may file his bill in the circuit court for the purposes stated, against the defendants, we deem it unnecessary at this

time to consider questions which may arise in the exercise of the jurisdiction. The questions certified by the circuit court are both answered in the negative.

CAMPBELL v. EMERSON.

(Circuit Court for Michigan: 2 McLean, 30-34. 1839.)

Opinion by the COURT.

STATEMENT OF FACTS.— This action is brought on a promissory note for the payment of money. The defendants pleaded in abatement that, on the 7th October, instant, a certain suit in attachment, in favor of certain persons by the names of Southgate, Blake and Adams, against Emerson, one of the plaintiffs in this suit, [was brought], and that the defendant, Emerson, and said Moore were summoned as garnishees, etc. To this plea the plaintiffs demurred, and assigned for cause that this action and the suit in attachment are different; that the causes of action are different, and that the suit in attachment was commenced long after the institution of this suit, etc.

In support of the demurrer the plaintiff cites Jac. Law Dictionary, title Abatement, 1, 4, where it is said it is a good plea in abatement that another action is pending for the same cause; but it must clearly appear that both actions are brought for the same thing. And, also, Gould's Plead., ch. 5, 283, 284, where another suit is pleaded in abatement of the one in which the plea is filed, it must appear that the action or suit which is pleaded in abatement was a prior suit pending between the same parties and for the same cause. 1 Wheat., 215. In support of the plea the Revised Statutes of Michigan, page 508, sec. 8, are referred to, where it is enacted "that the garnishee, from the time of receiving notice of the attachment, shall stand liable to the plaintiff in attachment in the amount of the property, money and credits in hand, or due from him to the defendant." And it is contended as the notes on which the defendant is sued in this court are credits of the plaintiffs in those suits, that they are bound in the hands of the garnishee. This being so, the attachment is a good plea in abatement; otherwise, if the defendant should pay the debt to the present plaintiffs, he might be compelled to pay it a second time to the plaintiff in attachment. That the proceedings are pending in different courts cannot impair the principle.

That the attachment is a proceeding *in rem*, creating a lien upon the debt and binding upon the defendants in their suits. It is insisted that these principles are settled in the case of Embree v. Hanna, 6 Johns., 103, and the cases there cited. Also in the case of McDaniel v. Hughes, 3 East, 367. In answer to the objection that the attachment was commenced subsequent to this suit, the case of Holmes v. Remson, 20 Johns., 229, is cited.

§ 313. *The jurisdiction of the federal court is not affected by the summoning of the defendant as garnishee in a suit subsequently instituted in a state court.*

We have not before us the statute of New York which regulates proceedings by attachment, but it is presumed to contain provisions which are not found in the Michigan statute. The institution of a suit by attachment, unless under some peculiar provision of the statute, could not supersede a suit previously commenced, and consequently cannot be pleaded in abatement. The attachment is used as a means to bring an absent or absconding debtor into court. If he enter his appearance and give special bail, the attachment is discharged and the suit proceeds as though the first process had been served on the defendant. In this case the jurisdiction had attached in this court before the proceed-

ing by attachment was instituted in the state court. And the question is raised whether this subsequent proceeding shall oust the jurisdiction previously vested.

It would seem to be contrary to all principle that a creditor, by issuing an attachment, should take from the custody of the court an instrument on which a suit had been previously commenced. It is the province of a court of chancery to enjoin the proceedings in a case at law; but chancery interferes only on the ground that there is not adequate relief at law. The attachment creates a lien on the property attached, and if the suit be prosecuted successfully and under the statute, other creditors are permitted to exhibit their claims; it might be necessary for such creditors to do so, whether they claim under a judgment, or in any other way. But in such case, there is no collision of jurisdiction. In certain cases the judgment creditor may come in under the attachment; but the proceedings on the attachment ought not to, and cannot, prevent the plaintiff in the first suit from prosecuting his claim to final judgment. He has selected the tribunal in which to prosecute his suit, and he has a right to the judgment of such tribunal. If the plea in this case was sustained, it would not be difficult, in many cases, to oust the jurisdiction of the courts of the United States, by issuing attachments in the state court. This would be taking from a non-resident of the state a right to sue in this court, which is given to him by the constitution of the United States, and an express act of congress. And in this view, the case is different from the case of *Holmes v. Remson*, 20 Johns., 229.

Had the attachment been levied before the commencement of this suit, there can be no doubt it might have been pleaded in abatement. In all such cases the suit first commenced cannot be abated by pleading a subsequent suit embracing the same subject-matter. This question was fully considered, and decided at the last term of the supreme court, in the case of *Wallace v. McConnell*, 13 Pet., 152. That case arose on facts similar to the case now under examination, and the principle was the same. And the court, in that case, decided that a subsequent suit, by attachment, where the debtor was summoned as garnishee, did not affect the jurisdiction of the circuit court of the United States. This is conclusive of the present case. When suit is commenced, the instrument on which it is founded is in the custody of the law, and cannot be withdrawn from such custody. And, especially, it cannot be withdrawn by the commencement of a suit, subsequently, at law.

The demurrer to the plea is sustained. Judgment for the plaintiffs.

THOMAS *v.* WOOLDRIDGE.

(Circuit Court for Mississippi: 2 Woods, 667-669. 1875.)

STATEMENT OF FACTS.—Wooldridge recovered a judgment in the United States circuit court against Thomas & Willis. Hedrich sued out an attachment from a state court against Wooldridge, which was levied on the judgment against Thomas & Willis, and process of garnishment was served upon them. They filed this bill against Wooldridge and the marshal for their own protection and to settle the question.

Opinion by BRADLEY, J.

The question in this case is, whether a judgment of this court may be attached by process issued out of a state court against the plaintiff in the judgment.

§ 314. *As a general rule, for which different reasons are given, a debt of record in a superior court cannot be attached.*

The general rule applicable to foreign attachments by the custom of London (from which our attachment laws are derived) is, that a debt of record in a superior court, and even a debt in suit, cannot be attached. Different reasons have been assigned, namely, that a record is of too high a nature to be attached; that it is against the dignity of the court to be thus interfered with; that the debt is *quasi in custodia legis*, and that the party has no opportunity to plead the attachment. 1 Rolle, Abr., 552; Com. Dig., Attach. (D.); Bac. Abr., Customs of Lond. (H. 1); 1 Leonard, 29; S. C., Cro. Eliz., 63; Cro. Eliz., 691; Shinn v. Zimmerman, 3 Zab., 150. But whatever may have been the ground of the rule, it has been adhered to in many of the states, though not in all. Serg. on Attach., 73; Drake on Attach., §§ 638-643. The question is made to depend somewhat on the statutes of the particular states. In those of Mississippi, there does not seem to be anything peculiar, if that would make any difference in the result.

Perhaps the best reason for the rule is that an attachment of a judgment would be an inconvenient and dangerous interference with judicial proceedings, opening the door to fraud and collusion for the purpose of preventing the due course of justice. And there are peculiar reasons why the judgments of state and federal courts should not be subject to attachments issued by each other, in the desire which each should have to avoid conflicts of jurisdiction. A court has not done with a case when judgment has been rendered. Many things have often to be done besides issuing executions; many adjustments of rights have to be made which require that the court should keep the supervision and control of its own judgments in its own hands. Any interference by other courts with this control, or with the prerogatives of executing its judgments and decrees in its own way, is calculated to excite jealousies between the courts concerned. We think the rule is a good one, and that it ought to be sustained.

It is not without sanction in the decisions of the United States courts. Besides that of Justice Story in *Franklin v. Ward*, 3 Mason, 136, which is referred to in the brief of counsel, the case of *Wallace v. McConnell*, 13 Pet., 136, is very much to the point. There a debt was attached in a state court after suit had been brought upon it in the United States court, and the attachment was set up by way of a plea *puis darrein continuance*. This plea was demurred to and overruled, and the supreme court, on error, affirmed the judgment. The court held that to sustain such an attachment would produce a collision in the jurisdiction of the courts that would extremely embarrass the administration of justice; but that if the attachment had issued before commencement of suit in the federal court, it might have been pleaded in abatement, if still pending, or in bar if judgment had been rendered thereon. This case virtually decides the one before us, and precludes further discussion.

The injunction must be dissolved and the bill dismissed with costs. Decree accordingly.

HILL, D. J., concurred.

ALABAMA GOLD LIFE INSURANCE COMPANY *v.* GIRARDY.

(Circuit Court for Louisiana: 9 Federal Reporter, 142. 1881.)

Opinion by PARDEE, J.

STATEMENT OF FACTS.—In this case the marshal, on execution, has made the sum of \$1,880.16 for the plaintiffs. To a rule directing him to pay over or show cause, he answers that the funds in his hands have been attached under process from the civil district court of the parish of Orleans, in a suit brought by W. H. Finnegan *v.* The Alabama Gold Life Ins. Co. The answer is not sufficient. The funds are in the custody of this court, and are not subject to the control or process of the state court. See case of Ellis *v.* Wooldridge, 2 Woods, 667 (§ 314, *supra*).

§ 315. *Process. Jurisdiction. Comity.*

The only doubt I have about making the rule absolute is whether, as a matter of comity, this court should not wait until the attachment is discharged in the state court, as it undoubtedly will be on suggestion of the facts, before disposing of the proceeds in the hands of the marshal.

But considering the absolute illegality of the pretended seizure, and that a delay may be taken as waiving the undoubted jurisdiction of this court in the premises, and repudiating any desire or intention of forestalling the action of the state court or of prejudicing its jurisdiction, I deem it my duty to make the rule absolute, and it is so ordered.

CLAFLIN *v.* HOUSEMAN.

(3 Otto, 130-143. 1876.)

ERROR to the Supreme Court of New York.

STATEMENT OF FACTS.—Houseman, assignee in bankruptcy, sued Claflin in a state court upon a charge that an illegal preference had been given to him by the bankrupt by suffering a judgment in default within four months before the commencement of proceedings in bankruptcy. Defendant demurred, stating as causes of demurrer that the court had no jurisdiction and that the complaint set forth no adequate cause of action. There was a judgment for the plaintiff.

Opinion by MR. JUSTICE BRADLEY.

The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy cannot sue in the state courts.

§ 316. *An assignee in bankruptcy might, under the act of 1867, before the revision, sue in a state court.*

It is argued that the cause of action arises purely and solely out of the provisions of an act of congress, and can only be prosecuted in the courts of the United States, the state courts having no jurisdiction over the subject. It is but recently settled that the several district and circuit courts of the United States have jurisdiction, under the bankrupt law, of causes arising out of proceedings in bankruptcy pending in other districts. There had been much doubt on the subject, but it was finally settled at the last term of this court in favor of the jurisdiction. Lathrop *v.* Drake, 91 U. S., 516. Had the decision been otherwise, as for a long period was generally supposed to be the law, assignees in bankruptcy, if the position of the plaintiff in error is correct, would have been utterly without remedy to collect the assets of the bankrupt in districts other than that in which the bankruptcy proceedings were pend-

ing. Neither the state courts nor the federal courts could have entertained jurisdiction. The Revised Statutes, whether inadvertently or not, have made the jurisdiction of the United States courts exclusive in "all matters and proceedings in bankruptcy." Sec. 711. Whether this regulation will or will not affect the cognizance of plenary actions and suits, it is not necessary now to determine. At all events, the question of such cognizance must be met in this case; and, being important in the principles involved, would require much deliberate consideration, had it not been already in effect decided by the court.

In the opinion of the court, in *Lathrop v. Drake*, it was taken for granted and stated that the state courts had jurisdiction (p. 518); but as the question was not directly involved in that case, it was more fully considered in *Eyster v. Gaff*, 91 U. S., 521, and it was there decided that a state court is not deprived of jurisdiction of a case by the bankruptcy of the defendant, but may proceed to judgment without noticing the bankruptcy proceedings, if the assignee does not cause his appearance to be entered, or proceed against him if he does appear. If there were anything in the constitution to incapacitate the state courts from taking cognizance of causes after the bankruptcy of the parties, as the constitutional argument of the plaintiff in error supposes, the proceedings in bankruptcy would *ipso facto* determine them. But on this subject, in *Eyster v. Gaff et al.*, the court say: "It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition." Again: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with, and does not divest that of, the state courts." pp. 525, 526.

§ 317. *State and federal courts have concurrent jurisdiction where an assignee in bankruptcy is a party.*

The same conclusion has been reached in other courts, both federal and state, which hold that the state courts have concurrent jurisdiction with the United States courts of actions and suits in which a bankrupt or his assignee is a party. See *Samson v. Burton*, 4 N. B. R., 1; *Payson v. Dietz*, 8 id., 193; *Gilbert v. Priest*, 8 id., 159; *Stevens v. Mechanics' Savings Bank*, 101 Mass., 109; *Cook v. Whipple*, 55 N. Y., 150; *Brown v. Hall*, 7 Bush, 66; *Mays v. Man. Nat. Bank*, 64 Penn. St., 74. There are contrary cases, it is true, as *Brigham v. Claflin*, 31 Wis., 607; *Voorhees v. Frisby*, 25 Mich., 476, and others; but we think that the former cases are founded on the better reason.

The assignee, by the fourteenth section of the bankrupt act (R. S., sec. 5046), becomes invested with all the bankrupt's rights of action for property and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common law actions, ejectment, trespass, trover, *assumpsit*, debt, etc., or suits in equity. Of these actions and suits the state courts have cognizance. Why should not an assignee have power to bring them in those courts as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the state courts?

The case is exactly the same as that of the Bank of the United States. The first bank, chartered in 1791, had capacity given it "to sue and be sued . . . in courts of record, or any other place whatsoever." It was held, in *The Bank v. Deveaux*, 5 Cranch, 61 (§§ 1344–45, *infra*), that this did not authorize the bank to sue in the courts of the United States, without showing proper citizenship of the parties in different states. The bank was obliged to sue in the state courts. And yet here was a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy. The second Bank of the United States had express capacity "to sue and be sued in all state courts having competent jurisdiction, and in any circuit court of the United States." In the case of *Osborn v. The Bank*, 9 Wheat., 738, 815, it was objected that congress had not authority to enable the bank to sue in the federal courts merely because of its being created by an act of congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the state courts. Under the bankrupt law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the state courts. *Ex parte Christie*, 3 How., 318, 319; *Nugent v. Boyd*, *id.*, 426; *Wood v. Jenkins*, 10 Met., 583.

Other analogous cases have occurred, and the same result has been reached; the general principle being, that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the constitution itself; but, if exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus the United States itself may sue in the state courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by United States authority may be enabled to sue in such courts. Nothing in the constitution, fairly considered, forbids it.

§ 318. *General question of concurrent jurisdiction between federal and state courts.*

The general question whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the constitution, laws and treaties of the United States has been elaborately discussed both on the bench and in public treatises,—sometimes with a leaning in one direction and sometimes in the other,—but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

§ 319. *Relation between the state and federal governments.*

When we consider the structure and true relations of the federal and state governments there is really no just foundation for excluding the state courts from all such jurisdiction. The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained

by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts, and, also, if the parties reside in different states, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, congress may, if it see fit, give to the federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall., 429, and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat., 334; and of Mr. Justice Swayne, in *Ex parte McNiel*, 13 Wall., 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How., 506 (§§ 332-336, *infra*); and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied. A reference to some of the discussions, to which the subject under consideration has given rise, may not be out of place on this occasion.

It was fully examined in the eighty-second number of "The Federalist," by Alexander Hamilton, with his usual analytical power and far-seeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate. After showing that exclusive delegation of authority to the federal government can arise only in one of three ways,—either by express grant of exclusive authority over a particular subject; or by a simple grant of authority, with a subsequent prohibition thereof to the states; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the states,—he says that these principles may also apply to the judiciary as well as the legislative power. Hence, he infers that the state courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes. But, as their previous jurisdiction could not by possibility extend to cases which might grow out of and be peculiar to the new constitution, he considered that, as to such cases, congress might give the federal courts

sole jurisdiction. "I hold," says he, "that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and, in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When, in addition to this, we consider the state governments and the national government, as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive, that the state courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

§ 320. *Opinion of congress as to concurrent jurisdiction as shown in the judiciary act and other early statutes.*

These views seem to have been shared by the first congress in drawing up the judiciary act of September 24, 1789; for, in distributing jurisdiction among the various courts created by that act, there is a constant exercise of the authority to include or exclude the state courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the state courts retained their usual jurisdiction concurrently with the federal courts invested with jurisdiction in like cases.

Thus, by the judiciary act, exclusive cognizance was given to the circuit and district courts of the United States of all crimes and offenses cognizable under the authority of the United States; and the same to the district courts, of all civil causes of admiralty and maritime jurisdiction, of all seizures on water under the laws of impost, navigation or trade of the United States, and of all seizures on land for penalties and forfeitures incurred under said laws. Concurrent jurisdiction with the state courts was given to the district and circuit courts of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States, and of all writs at common law where the United States are plaintiffs; the same to the circuit courts, where the suit is between a citizen of the state where the suit is brought and a citizen of another state, where an alien is a party, etc. Here, no distinction is made between those branches of jurisdiction in respect to which the constitution uses the expression "*all cases*," and those in respect to which the term "*all*" is omitted. Some have supposed that wherever the constitution declares that the judicial power shall extend to "*all cases*"—as, all cases in law and equity arising under the constitution, laws and treaties of the United States; all cases affecting ambassadors, etc.,—the jurisdiction of the federal courts is necessarily exclusive; but that where the power is simply extended "*to controversies*" of a certain class—as, "*controversies to which the United States is a party*," etc.,—the jurisdiction of the federal courts is not necessarily exclusive. But no such distinction seems to have been recognized by congress, as already seen in the judiciary act; and subsequent acts show the same thing. Thus, the first patent law for securing to inventors their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case founded on the statute in the circuit court of the United States, "*or any other court having competent jurisdiction*,"—meaning, of

course, the state courts. The subsequent acts on the same subject were couched in such terms with regard to the jurisdiction of the circuit courts as to imply that it was exclusive of the state courts; and now it is expressly made so. See Patent Acts of 1800, 1819, 1836, 1870, and Rev. Stat. U. S., sec. 711; *Parsons v. Barnard*, 7 Johns., 144; *Dudley v. Mayhew*, 3 Comst., 14; *Elmer v. Pennel*, 40 Me., 434.

So with regard to naturalization — a subject necessarily within the exclusive regulation of congress — the first act on the subject, passed in 1790, and all the subsequent acts, give plenary jurisdiction to the state courts. The language of the act of 1790 is, “any common law court of record in any one of the states,” etc. 1 Stat., 103. The act of 1802 designates “the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States.” 2 Stat., 153.

So, by acts passed in 1806 and 1808, jurisdiction was given to the county courts along the northern frontier, of suits for fines, penalties and forfeitures under the revenue laws of the United States. 2 Stat., 354, 489. And by act of March 3, 1815, cognizance was given to state and county courts, generally, of suits for taxes, duties, fines, penalties and forfeitures arising under the laws imposing direct taxes and internal duties. 3 Stat., 244.

These instances show the prevalent opinion which existed, that the state courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the state courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general argument. See *United States v. Lathrop*, 17 Johns., 4. See, especially, the able dissenting opinion of Mr. Justice Platt, *id.*, 11.

§ 321. *Jurisdiction originally possessed by state courts, or at any time conferred upon them by state authority, may be exercised concurrently with federal courts, except when expressly taken away.*

It was, indeed, intimated by Mr. Justice Story, *obiter dictum*, in delivering the opinion of the court in *Martin v. Hunter's Lessee*, 1 Wheat., 334–337, that the state courts could not take *direct* cognizance of cases arising under the constitution, laws and treaties of the United States, as no such jurisdiction existed before the constitution was adopted. This is true as to jurisdiction depending on United States authority; but the same jurisdiction existed (at least to a certain extent) under the authority of the states. Inventors had grants of exclusive right to their inventions before the constitution was adopted, and the state courts had jurisdiction thereof. The change of authority creating the right did not change the nature of the right itself. The assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations, and did not have much influence with the court when a proper case arose for its adjudication. *Houston v. Moore*, 5 Wheat., 1, was such a case. Congress, in 1795, had passed an act for organizing and calling forth the militia, which prescribed the punishment to be inflicted on delinquents, making them liable to pay a certain fine, to be determined and adjudged by *a court-martial*, without specifying what court-martial. The legislature of Pennsylvania also passed a militia law, providing for the organization, training and calling out the militia, and establishing courts-martial for the trial of delinquents. The law in many respects exactly corresponded with that of the United States, and,

as far as it covered the same ground, was for that reason held to be inoperative and void. Houston, a delinquent under the United States law, was tried by a state court-martial; and it was decided that the court had jurisdiction of the offense, having been constituted, in fact, to enforce the laws of the United States which the state legislature had re-enacted. But the decision (which was delivered by Mr. Justice Washington) was based upon the general principle that the state court had jurisdiction of the offense, irrespective of the authority, state or federal, which created it. Not that congress could confer jurisdiction upon the state courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. Justices Story and Johnson dissented; and, perhaps, the court went further in that case than it would now. The act of congress having instituted courts-martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void. Be this as it may, it was only a question of construction, and the court conceded that congress had the power to make the jurisdiction of its own courts exclusive.

In *Cohens v. Virginia*, 6 Wheat., 415 (§§ 734-745, *infra*), Chief Justice Marshall demonstrates the necessity of an appellate power in the federal judiciary to revise the decisions of state courts in cases arising under the constitution and laws of the United States, in order that the constitutional grant of judicial power, extending it to all such cases, may have full effect. He says, "The propriety of intrusting the construction of the constitution and laws, made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn in question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws and treaties of the United States, and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted." See the subject further discussed in 1 Kent's Com., 395, etc.; Sergeant on the Const., 268; 2 Story on the Const., sec. 1748, etc.; 1 Curtis' Com., secs. 119, 134, etc.

The case of *Teal v. Felton* was a suit brought in the state court of New York against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the supreme court and court of appeals of New York, and their decision was affirmed by this court. 1 Comst., 537; 12 How., 292. We do not see why this case is not decisive of the very question under consideration. Without discussing the subject further, it is sufficient to say that we hold that the assignee in bankruptcy, under the bankrupt act of 1867, as it stood before the revision, had authority to bring suit in the state courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case.

Judgment affirmed.

PARSONS v. LYMAN.

(Circuit Court for New York: 5 Blatchford, 170-182. 1863.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—On the 24th of October, 1848, Samuel Parsons, of Durham, in the state of Connecticut, died, leaving a large estate, and a last will and testament. By this will the defendants in this bill were appointed his executors. They qualified and proceeded to settle the estate in the court of probate for the district of Middletown, that tribunal, under the law of Connecticut, having exclusive original jurisdiction thereof. The settlement of the estate, so far as that court had exclusive jurisdiction, was substantially completed on the 20th of November, 1849, by the adjustment of the executors' accounts, after due notice of the time and place of hearing, to all parties interested, according to law. But the connection of the defendants with the property left by the deceased and disposed of by his will did not terminate with the settlement of the estate, as a mere testate estate in the appropriate tribunal, for they were not only appointed executors by the will, with the usual powers of executors, but, by the instrument itself, they were made special trustees of a large portion of the property. After providing for his widow, and disposing of a single article of personal property by way of bequest to a daughter, the will provides as follows: "All the rest, residue and remainder of my estate, real and personal, of every nature and description, that shall belong to me, or to which I shall be in any way or manner entitled, at law or in equity, at the time of my decease, subject to the foregoing provision for my said wife, I give, devise and bequeath to my executors hereinafter named, and to their heirs, executors, administrators and assigns in trust." Then follow various provisions defining the trust (which was for the benefit of the testator's children and their heirs), directing as to its execution, and conferring, in particular instances, discretionary powers upon the trustees as to the amounts to be paid to the *cestuis que trust* from time to time. It will be seen, from this statement, that the defendants sustained two relations to the will and the estate of the deceased, namely, that of executors, and that of trustees. As executors it was their duty to prove the will, to give the requisite bond, with the aid of appraisers to prepare and file an inventory, to pay the funeral expenses and debts of the deceased, and the disbursements necessary in the progress of administration, and to perform all that the law requires of those who administer on testate estates, including the final settlement of their accounts in the court where all their proceedings were had. All these duties the defendants, as executors, performed, the last one being completed on the 20th of November, 1849, when their accounts as executors were adjusted and substantially closed. From that time to the present they have continued to discharge their duties as trustees. For this latter service they have claimed compensation, and have deducted the same from the income of the estate in their hands. The will creating the trust expressly provides that they shall be allowed a fair compensation for their services in the administration of the trust, and exempts them from giving bonds therefor, although, by the law of the state, they were required to, and did, give bonds for the faithful performance of their duties as executors. The present bill is brought in this court by the *cestuis que trust*, who are citizens of the state of New York, alleging that the defendants, or one of them, David Lyman, upon whom most of the care of the estate has fallen, have charged and retained, out of the trust funds, an unreasonable sum for such services, and praying an account.

The defendant Lyman has filed an answer, setting forth the will and the various proceedings in the court of probate, showing the action of the defendants touching the estate, both as executors and trustees, and upon the facts thus set up in the answer the defendants move to dismiss the bill for want of jurisdiction.

The objection to the jurisdiction of this court must rest upon one of two grounds: either, first, that the original jurisdiction of the court of probate for the district of Middletown is exclusive over the subject-matter of this controversy, or, second, that it is concurrent with that of this court, and that the court of probate has already become possessed of the litigation by an adjudication thereon or by proceedings at present pending therein. If the probate court has adjudicated upon this controversy, then it is *res judicata*, the subject of litigation is exhausted, and there is no jurisdiction left for this court to exercise. No appeal lies to it from the probate court, or from any other state tribunal; nor can it revise in any manner the doings of the local courts. If the controversy is pending in the court of probate, the jurisdiction of this court equally fails, from the well known rule that, where the jurisdiction of courts is concurrent over a subject-matter, that tribunal which is first in possession of it exercises its jurisdiction to the exclusion of all others.

§ 322. *Jurisdiction of Connecticut probate courts discussed.*

The first question to determine is, whether the court of probate for the district of Middletown has exclusive jurisdiction of the subject-matter of this controversy; and in deciding this point it is not necessary to consider the question whether or not the circuit courts of the United States have concurrent jurisdiction with the state probate courts over the accounts of executors and administrators. For, as already intimated, I hold that the relation of the defendants to this trust estate, as trustees, is the same as if they had not been named executors in the will, and the property had been devised and bequeathed to them in trust by their individual names. It would, of course, have been competent for the testator to confer this trust upon them by his will, and still name any other person as sole executor of the latter. In that case there would have been no clashing of duties and powers between such executor and the trustees. The duties and powers of the latter would have begun where those of the former ended. And although the defendants are appointed by the will to act in both capacities, this fact does not obliterate the distinction which the law makes between the duties and powers that pertain to these respective offices. The defendants seem to have properly recognized this distinction by filing in the court of probate, since the settlement of their executors' account, an annual account, at first voluntary, and since 1853 in accordance with a statute of Connecticut relating solely to guardians of minors, conservators and trustees of estates. We come, then, to consider what are the nature and extent of the jurisdiction of the courts of probate of Connecticut over the accounts of these defendants as trustees.

These courts in Connecticut have always been considered as possessing only a limited jurisdiction. 1 Swift's Dig., 606; *Wattles v. Hyde*, 9 Conn., 10, and cases there cited. The statute of Connecticut conferring jurisdiction upon these tribunals provides that they "shall have cognizance of the probate of wills, the granting of administration, the appointing and approving of guardians, and shall act in all testamentary matters and every other matter in which it shall be legal and proper for a court of probate to act, and shall have and exercise all the powers conferred on them by the act relating to the settlements

of estates, by the law relating to guardians, the law relating to idiots, lunatics and spendthrifts, the law relating to escheats, and all other powers conferred on them by law." This grant of jurisdiction, in its general provisions, clearly gives to these courts control over all matters that properly pertain to probate tribunals. But it does not necessarily include all matters that relate to the disposition of property under the directions given in a will. In *Strong v. Strong*, 8 Conn., 408, where real estate was given by will to the sons of the testator, and he ordered it to be divided by his executors among them, and such executors made a division and returned it to the court of probate, by which it was accepted and approved, on appeal from that decree it was held that the question whether the division was according to the will or not was not a subject of probate cognizance, and therefore not within the appellate jurisdiction of the superior court. The opinion in that case will be found instructive, as stating the limitation of the powers of courts of probate, under the statutes of Connecticut, over the distribution of testate estates. There is a distinction made by those statutes relating to distribution between testate and intestate estates, but this distinction was derived from the English law, and is not a mere arbitrary one made for local convenience. Even in intestate estates, under the English system, equity had a concurrent jurisdiction with the ordinary. "But equity has an exclusive cognizance of those cases in which there is an executor, and the residue is undisposed of, for then the executor is a trustee for the residue, and the ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust." Williams on Executors, p. 1783. In the case of *Strong v. Strong*, already cited, Peters, J., remarks: "Real estate is given by will, and is ordered by the testator to be divided. Two persons are appointed to divide the same. They are both alive and have not neglected or refused to make the division. Whether they have done right or wrong, or whether the division be according to the will or not, are not questions of probate cognizance." These remarks and citations are made to show that a general grant of jurisdiction to courts of probate of all matters properly cognizable by such tribunals does not embrace all the powers and duties of executors as such. Much less would it embrace the dealings of testamentary trustees. "Courts of equity, from their inherent jurisdiction, assumed from the beginning the exclusive control over trustees in the discharge of their duties, whether affecting real or personal estate." Hill on Trustees, p. 42, p. 50 of Wharton's ed.

§ 323. *Administration of testamentary trusts not, strictly speaking, a testamentary or probate matter.*

The statute of Connecticut which I have already cited embraces in its enumeration of subjects committed to the probate courts, some that are peculiarly cognizable by courts of chancery generally, but it nowhere includes trustees of the character of the defendants. True, it says that they "shall act in all testamentary and probate matters;" but I apprehend that the administration of a testamentary trust like the one before us is, strictly speaking, neither a testamentary nor a probate matter. A trust of this character, whether created by will or by deed, is to be administered in the same manner, and the trustees in either case are amenable to the courts of chancery.

§ 324. *The jurisdiction of equity tribunals in controversies between trustees and cestuis que trust cannot be abridged by implication.*

The jurisdiction over such trusts and trustees has peculiarly pertained to these courts from the earliest times, and an act withdrawing them from that

jurisdiction must be plain and specific. That jurisdiction will not be ousted by mere implication. I find nothing in the terms of the act in question which embraces these trusts, and after a careful examination of the various statutes of Connecticut referred to in the act itself, and of those acts which directly confer powers on the court of probate, I find none giving jurisdiction to that court of the character claimed by the defendants. There are several acts (Stats. of Conn., pp. 490, 491) which empower these courts to remove and appoint trustees, but these special grants of power do not draw after them into these courts jurisdiction over the administration of the trusts.

But the defendants rely especially upon the act relating to guardians, trustees and conservators (Stats. of Conn., p. 283), which provides that such guardians, trustees and conservators shall annually render their respective accounts to the court of probate for their respective districts for the year next preceding the date of such accounts so rendered, and embrace therein a schedule of the estate with various other particulars. The same act also requires them to make oath to the accounts so rendered. Now, it is not necessary to inquire, in this place, whether this act, in connection with others relating exclusively to guardians of minors and conservators, confers upon probate courts exclusive jurisdiction over the accounts of the latter two. I confine myself to the accounts of trustees of the character in question. I have looked in vain through the statutes of Connecticut for any express power conferred on the courts of probate to settle the accounts of such trustees or to adjudicate upon any controversy between the trustees and the *cestuis que trust* pertaining thereto. There is no provision in the law requiring notice to be given to the parties interested of the time and place of such settlement, or of any hearing thereon, as is required in the case of the accounts of executors and administrators. It is quite true that the act of 1854 (Stats. of Conn., p. 492) speaks of the final "settlement of the account of any executor, administrator or trustee," and requires them to make oath thereto. But this latter act clearly refers to a different class of persons from that referred to in the act of 1853 requiring annual accounts to be filed. It omits guardians of minors and conservators, and includes executors and administrators. It includes trustees, *eo nomine*, but not, as I think, trustees created by deed or will, and administering trusts of the character of the one before the court. It evidently refers to the trustees of insolvent estates assigned for the benefit of creditors, or in course of settlement under the act of 1853 for the relief of insolvent debtors. The principal object of the statute of 1854 was to require the parties accounting to make oath to their accounts. But testamentary trustees were already required to make oath to their annual accounts, by the act of 1853, which imposes the duty of rendering them. Courts of probate are expressly authorized to call executors and administrators and trustees of assigned and insolvent estates to account, and to proceed, on notice to all parties concerned, to final settlement. I conclude, therefore, that no jurisdiction is given to courts of probate over the settlement of the accounts of trustees of the character of the defendants. The terms "shall render," in the act of 1853, do not necessarily imply that the tribunal to whom the account is to be "rendered" shall have power to judicially settle it. The rendition and the settlement of an account are distinct matters. As Chancellor Walworth remarks, in *Westervelt v. Gregg*, 1 Barb. Ch., 469, 476, "the rendering of an account by an executor or administrator, and the settlement of that account after it has been rendered, are not one and

the same proceeding, though the latter is frequently a mere continuation of the former proceeding."

§ 325. *The equity powers of United States circuit courts cannot be abridged by state legislation.*

But, if it be assumed that the requirement of the act of 1853, compelling trustees to file their annual accounts in the court of probate, draws after it the power enabling these courts to settle them, I apprehend that, so far as controversies between citizens of another state and trustees who are citizens of this state, arising on these accounts, are concerned, such jurisdiction of the court of probate would only be concurrent with that of this court. If the jurisdiction of the probate courts is made, by the statutes of the state, exclusive as against the other state tribunals, it by no means follows that it is exclusive as against this court. The equity powers of the courts of the United States cannot be abridged by state legislation. Though the jurisdiction of all matters properly cognizable by courts of chancery were to be confined, by the law of the state, to the court of probate, or to any other tribunal, the equitable jurisdiction of this court would remain untouched. If the controversy be between a citizen of another state and a citizen of this state, and exceeds \$500, exclusive of costs, and is properly cognizable by a court of chancery, under the general principles which regulate equity jurisdiction, this court is fully empowered, by the constitution and laws of the United States, to take cognizance of it. The courts of the United States neither exercise nor claim any probate jurisdiction. That jurisdiction belongs exclusively to the state tribunals. It is local and domestic in its character, and rightfully belongs where the federal constitution and laws have left it, with the local and domestic courts. But over all matters of equity jurisdiction, properly speaking, the federal courts, when the proper parties are before them, and the required sum is in dispute, have original cognizance, concurrent with the courts of the several states. Nor can they be deprived of this jurisdiction, or of any portion of it, by its absorption, through state legislation, into any particular state tribunals, or by any attempted transfer of the subjects of litigation from one department of jurisprudence to another, such as the transmutation by statute of a subject-matter of equitable jurisdiction into one of merely probate cognizance.

§ 326. *The annual rendering of accounts by trustees in the probate court does not constitute a lis pendens in that court.*

That the controversy which arises on this bill and answer, between the *cestuis que trust* and their trustees, touching the accounts of the latter for services and disbursements in the management of the trust, belongs, upon general and acknowledged principles, peculiarly to a court of chancery, requires no argument or authority to prove. In this view of the case, this court would clearly have jurisdiction of the controversy, so far as it relates to the accounts of the defendants which have not been rendered in the court of probate previous to the filing of this bill. It cannot, with reason, be said, that the rendering to, and approval by, the court of probate of the annual accounts of these trustees, is a continuous accounting, and thus a perpetual *lis pendens*, in that tribunal. Each separate annual account is a distinct matter, and each presentation to, and approval by, the court of probate is a separate proceeding. It follows, therefore, that this court has jurisdiction of the accounts of the defendants which have accrued since the rendition to the court of probate of their last annual account next preceding the bringing of this bill.

§ 327. *The requirement of trustees by law to file annual accounts in the court of probate does not empower such tribunal to "settle" these accounts.*

We come now to consider the question of jurisdiction, so far as it relates to the annual accounts of these trustees, which had been rendered to the court of probate prior to the commencement of this suit. I think that the probate court had no power to "settle" these accounts, in any judicial sense. No such power is expressly conferred upon it, and none, I think, ought to be inferred from the mere fact that the trustees are required to render them in writing and under oath. There are cogent reasons why such a duty should be imposed on trustees. Their annual accounts, showing the apparent condition of the trust estate, and the manner in which it is managed by them, are thus put in possession of a public officer, and become a part of the files in his office, where they are open to the inspection of all concerned. The reason of the statute is therefore satisfied, without attributing to it the intent to confer the power to judicially settle and adjust the accounts upon the courts of probate.

§ 328. *Had a probate court jurisdiction to settle accounts of trustees rendered to it, this could only be exercised after due notice to parties interested.*

But, if it is insisted that upon a comparison of all the statutes of this state relating to trustees and trust estates, it is fairly to be inferred that this power is vested in the probate courts, then, I think, it must also be inferred that it is to be exercised only on due notice to the parties interested. For it was well said by Chief Justice Marshall, in *The Mary*, 9 Cranch, 126, that "it is a principle of natural justice, of universal obligation, that, before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. When the proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself."

I apprehend that the settlement of the trustees' account is not, properly speaking, a proceeding *in rem*. It is a proceeding for the judicial adjustment of the charges for personal services and disbursements of a person acting in a fiduciary capacity. It is analogous to the settlement of the accounts of executors and administrators, where notice is expressly required by the statutes of Connecticut. And if notice is required in case of the latter, where the whole settlement of the estate is peculiarly within the cognizance of the court of probate, by the general principles of law regulating the jurisdiction of such tribunals, *a fortiori* should it be required in cases of special trusts, created by will or deed, for the benefit of minors and married women, which the law and the courts regard with jealous solicitude. In a case involving the necessity of commissioners on an insolvent debtor's estate giving notice, as an indispensable prerequisite to their exercise of jurisdiction, Judge Bissell, after remarking that the statute required such notice, says: "But this conclusion, drawn from the statute, may be maintained on general principles. The judgment of a court of even general jurisdiction cannot affect a person who had no notice to appear. As to him, the proceedings are *coram non judice*." *Starr v. Scott*, 8 Conn., 480, 484. In *Case v. Humphrey*, 6 Conn., 130, 139, Chief Justice Hosmer remarks: "The jurisdiction of a court, if it extend to the parties and subject-matter when legally before it, can never be called into exercise, unless through the medium of a process complete in law and duly served; or, in other words, the court must have cognizance of the process before it can do any legal act in the cause."

The fact that, in cases like the one before us, there may be an appeal, if the *cestuis que trust* happen to learn of the proceeding in the court of probate in time, can make no difference. They are bound, if the position of the defendants here is correct, by the proceeding, until and unless an appeal is taken. I cannot infer, therefore, that the legislature has empowered the probate courts to judicially determine the rights of parties, often involving delicate and important questions, in a purely *ex parte* proceeding, in violation of what is termed, by numerous and eminent authorities, a fundamental principle of natural justice. If the power to judicially settle and adjust these accounts is to be deemed as inferentially given, then I think the duty to give reasonable notice of the time and place of its exercise, to the parties interested, must be deemed to be inferentially imposed upon the tribunal exercising it.

No notice appears to have been given to the plaintiffs of the intended settlement of these accounts. The answer impliedly admits this fact. They involve considerable sums, and their presentation and approval seem to have been simultaneous acts. No judicial proceeding was ever "pending" in the court of probate, upon which it could pronounce a binding decree on the plaintiffs, and, if it has assumed to exercise such a power, its exercise, so far as its judicial character is concerned, must be deemed void. But I do not infer that the court of probate has assumed to act judicially upon any of these trustee accounts, since November 20, 1849. As already intimated, the answer concedes that no notice was given of the time or place of hearing, and the only entries on the record warrant the inference that the action of the judge of probate in the premises was rather clerical than judicial.

I am aware of the case of Hiscock's Appeal, 29 Conn., 561. In the opinion of the court of errors, Mr. Justice Sanford remarks that "there is no law which requires that notice shall be given to the ward to be present at the settlement with the court of probate of his guardian's account, nor is the jurisdiction of that court or the validity of its proceedings in regard to such settlement affected by want of such notice or by the absence of the ward; the only effect of such want of notice and absence being to extend the time allowed by law for appealing from the decree of the court of probate to the superior court." I have felt some embarrassment from this language of the court, but I do not see that that precise question was necessarily involved in the case then before it. The superior court found that notice was in fact given, and that the party was present by attorney, but that he failed to appeal within the time limited by the statute. It also appears that the statutes relating to guardians expressly confer jurisdiction upon the court of probate to settle their accounts, and to hold that this can be done without notice certainly should require an express and unmistakable act of the legislature. Whether the relation of guardian and ward is the same as that of trustee and *cestui que trust*, I am not prepared to determine. But if the statute had expressly given this power over trustees' accounts and dispensed with notice, I think the question whether it would not be a proceeding in which persons might be "deprived of their property without due process of law," would be a very grave one indeed.

It follows, from these views, that the defendants must account in this court for all charges for services and disbursements made and rendered in the management of this trust since the 20th of November, 1849. There may be some items, in the earlier annual accounts, that properly pertain to their duties and disbursements as executors. The trustees will be fully protected in the premises on the hearing.

STEARNS *v.* UNITED STATES.

(Circuit Court for Vermont: 2 Paine, 300-313. 1826.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—This case comes up on a writ of error to the district court of Vermont. It was an action of debt brought by the United States, as assignees of the sheriff of the county of Bennington, and state of Vermont, on a bond given for the liberties of the prison; the action being for an escape in violation of the bond. The defendants set up as their defense: 1st. That the judgment recovered against Stearns, and upon which he was committed to prison, was as bail for one William S. Cardell, who was prosecuted in the Bennington county court of the state of Vermont for a penalty incurred under the act of congress of the 2d August, 1813 (vol. IV, L. U. S., 611), entitled “An act laying duties on licenses to retailers of wine, spirituous liquors and foreign merchandise,” and alleging such judgment was void for want of jurisdiction in the state court to entertain such suit. 2d. That Stearns, after his commitment, and before his escape, was discharged from imprisonment under the law of the state of Vermont relative to poor prisoners.

To these pleas there was a general demurrer and joinder, and the district court gave judgment for United States upon the demurrer. The ground upon which the first plea is attempted to be sustained is, that the state court of Vermont had no jurisdiction in the original cause out of which the action in the district court grew. It would certainly be going very great lengths to look back now to the original cause of action. A judgment having been recovered against Cardell, the original offender, without interposing any objection — and a judgment against Stearns, his bail — and no objection made until suit is brought upon the bond for the jail liberties, I am not prepared, however, to say that if the original cause was *coram non judice*, and absolutely void, it would be too late to take advantage of it.

§ 329. *Whether or not congress may confer jurisdiction in civil suits upon state courts.*

Under the judiciary act of 1789, exclusive original cognizance is given to the district courts in all suits for penalties and forfeitures incurred under the laws of the United States; but by the act under which the penalty in question was incurred, jurisdiction is given to the state courts in certain specified cases, within which I must presume the present falls, as the plea contains no averment to the contrary. This act must, therefore, be considered *pro tanto* a repeal of the judiciary act of 1789, and, unless unconstitutional, must give jurisdiction to the state courts. There has been great diversity of opinion entertained by different courts and different judges in the United States upon the question how far it was competent for congress to give jurisdiction to the state courts in cases coming under the laws of the United States. The cases in which these opinions have been drawn forth have generally been criminal cases arising upon *habeas corpus*.

It seems to be admitted by all, that congress may vest exclusively in the courts of the United States all the judicial power of the United States, but whether imperative upon congress so to do is a point upon which some diversity of opinion has been entertained. 1 Wheat., 304. And it seems to be admitted, also, that no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state tribunals. And the judiciary act of 1789 gives to the courts of the United States exclusive jurisdiction of all crimes and

offenses cognizable under the authority of the United States, except when the laws of the United States shall otherwise provide. And we accordingly find, in various acts of congress, this reservation is expressly made, and is done, not by way of grant of any power, but to remove a disability created by the judiciary act of 1789. In the case of *Houston v. Moore*, 5 Wheat., 1, it was held by the supreme court of the United States that congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States; although the state courts may exercise jurisdiction in cases authorized by the laws of the state and not prohibited by the exclusive jurisdiction of the federal courts. Chancellor Kent, 1 Commentaries, 374, says: "The conclusion then is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter."

§ 330. *The exercise of jurisdiction in civil suits conferred by congress upon state courts is generally considered optional.*

There are numerous acts of congress in which duties have been imposed on state magistrates and courts, and by which they have been invested with jurisdiction in civil suits, and over complaints and prosecutions, in cases for fines, penalties and forfeitures accruing under laws of the United States; and it seems to be pretty generally admitted that the state courts are not bound to exercise jurisdiction although given, but it was optional with them to do it or not; and in some instances the state courts have acted in those cases, and in some have declined jurisdiction. In the state of New York it has been settled that the state courts have concurrent jurisdiction upon *habeas corpus* with the United States courts, when the imprisonment was by an officer of the United States, by color or under pretext of the authority of the United States; and there has been the like practice in some other states, and in some jurisdiction has been declined. In the case of *United States v. Dodge*, 14 Johns., 95, the supreme court sustained a suit upon a bond for duties given to a collector of the United States customs. This was an action founded entirely upon the laws of the United States, and did not and could not have existed prior to the adoption of the federal government. But the same court decided in the case of *United States v. Lathrop*, 17 Johns., 4, that they had no jurisdiction of a suit for a penalty incurred under the act now in question, and that jurisdiction could not be conferred by congress. This last case seems to be put upon the ground that the United States and the state governments are to be considered entirely as foreign to each other, and that the case falls under the rule that the courts of one sovereignty will not take cognizance of and enforce the penal code of another. I cannot concur in this broad view of the relation in which the United States and the state governments stand to each other, or that the laws of the United States are to be considered as the laws of a foreign government. They are laws operating upon and binding on the same people as the government and laws of the several states. The laws of one state may be considered as foreign in relation to the government and actions of another state, because in no sense binding without the jurisdiction of the state. Not so with respect to the laws of the United States. The government of the United States and that of the states ought rather to be considered as parts of

the same system. The law in question was binding on the people of the state of Vermont, and declared by the constitution to be the supreme law of the land, and the judges of this state are sworn to support the constitution. This was not a criminal prosecution, but a civil action to recover a penalty for breach of a statute. It was no more a suit or penalty created by a law of the United States than was a suit for the collection of a duty bond; both grew out of laws of the United States, and could not have existed without such laws. To sustain this suit is not administering the criminal law of the United States. Actions for penalties are civil actions, both in form and in substance, according to Blackstone. 3 Com., 158. The action is founded upon that implied contract which every person enters into with the state to observe its laws. Cowp., 391; 2 Term R., 154; 4 id., 756. Congress cannot compel a state court to entertain jurisdiction in any case; they are not inferior courts in the sense of the constitution; they are not ordained by congress. State courts are left to consult their own duty from their own state authority and organization. Their jurisdiction of federal causes, says Chancellor Kent (1 Com., 377), is confined to civil actions for civil demands, or to enforce penal statutes; they cannot hold criminal jurisdiction over offenses exclusively existing as offenses against the United States. Every criminal prosecution must charge the offense to have been committed against the sovereign whose courts sit in judgment upon the offender (1 Kent, Com., 370); the first plea, therefore, cannot be sustained.

§ 331. *The United States, when suing as a body corporate in a state court, must abide by the state laws.*

With respect to the second question, as to the effect of the discharge from imprisonment, the statute of Vermont makes no exception in relation to claims or demands on the part of the United States; and I am not able to discover any sound principle upon which this case can be taken out of the statute by implication. The United States are a body corporate, having a capacity to contract, to take and to hold property, and in this respect stand upon the same footing with other corporate bodies; and if they will prosecute their suits in the state courts, and avail themselves of the state laws for this purpose, it is not perceived that any good reason can be given why such state process as they use for the purpose of enforcing their right should not be subject to the state law. Had the suit been originally prosecuted in a court of the United States, and the imprisonment, under an execution, issued from such court, different considerations might have been presented. But there are no principles of prerogative applicable to the case which will take it out of the statute, especially as this is not a debt exclusively due to the United States. The act gives a moiety only to the United States, and the other moiety goes to the collector or the informer, although the suit is in the name of the United States. The law authorizes the suit to be prosecuted in the name of the United States or the collector.

Exception has been taken to some informalities in the plea. These exceptions might have been entitled to some consideration if they had been brought before the court upon a demurrer to the plea; but they come too late to be taken advantage of upon a writ of error.

The cause of action alleged in the declaration is substantially an escape from the prison limits. The plea sets up a discharge from the imprisonment, under the law of the state of Vermont; and all the material allegations in the plea to bring the case within the act are substantially stated; and these were ad-

mitted by the demurrer. The judgment of the district court, upon the effect of such discharge, was, that it did not furnish any excuse for the escape, but that the bond for the jail limits was forfeited, notwithstanding such discharge under the state law. In this, I think, the court erred, and that the judgment must be reversed.

This view of the case might have rendered it unnecessary to express any opinion upon the first point; but as some question may, possibly, hereafter arise whether the judgment recovered in the state courts was absolutely void or not, it was deemed expedient to express an opinion on that point also, although in this respect the judgment of the district court is not considered erroneous, but is reversed upon the other point in the case.

Judgment reversed.

ABLEMAN *v.* BOOTH—UNITED STATES *v.* BOOTH.

(21 Howard, 506-527. 1858.)

ERROR to the Supreme Court of Wisconsin.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The plaintiff in error in the first of these cases is the marshal of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend, to some extent, upon the same principles. On that account they have been argued and considered together, and the following are the facts as they appear in the transcripts before us:

Sherman M. Booth was charged before Winfield Smith, a commissioner duly appointed by the district court of the United States for the district of Wisconsin, with having, on the 11th day of March, 1854, aided and abetted, at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States for that district, under the act of congress of September 18, 1850. Upon the examination before the commissioner, he was satisfied that an offense had been committed as charged, and that there was probable cause to believe that Booth had been guilty of it; and thereupon held him to bail to appear and answer before the district court of the United States for the district of Wisconsin, on the first Monday in July then next ensuing. But on the 26th of May his bail or surety in the recognizance delivered him to the marshal, in the presence of the commissioner, and requested the commissioner to recommit Booth to the custody of the marshal; and he having failed to recognize again for his appearance before the district court, the commissioner committed him to the custody of the marshal, to be delivered to the keeper of the jail until he should be discharged by due course of law.

Booth made application on the next day, the 27th of May, to A. D. Smith, one of the justices of the supreme court of the state of Wisconsin, for a writ of *habeas corpus*, stating that he was restrained of his liberty by Stephen V. R. Ableman, marshal of the United States for that district, under the warrant of commitment hereinbefore mentioned; and alleging that his imprisonment was illegal, because the act of congress of September 18, 1850, was unconstitutional and void; and also that the warrant was defective, and did not describe the offense created by that act, even if the act were valid. Upon this application the justice, on the same day, issued the writ of *habeas corpus*, directed to the marshal, requiring him forthwith to have the body of Booth before him (the said justice), together with the time and cause of his imprisonment. The mar-

shal thereupon, on the day above mentioned, produced Booth and made his return, stating that he was received into his custody, as marshal, on the day before, and held in custody by virtue of the warrant of the commissioner above mentioned, a copy of which he annexed to and returned with the writ. To this return Booth demurred, as not sufficient in law to justify his detention. And upon the hearing the justice decided that his detention was illegal, and ordered the marshal to discharge him and set him at liberty, which was accordingly done.

§ 332. *Removal by certiorari of proceedings on application for habeas corpus, from justice of state supreme court to supreme court.*

Afterwards, on the 9th of June in the same year, the marshal applied to the supreme court of the state for a *certiorari*, setting forth in his application the proceedings hereinbefore mentioned, and charging that the release of Booth by the justice was erroneous and unlawful, and praying that his proceedings might be brought before the supreme court of the state for revision. The *certiorari* was allowed on the same day; and the writ was accordingly issued on the 12th of the same month, and returnable on the third Tuesday of the month; and on the 20th the return was made by the justice, stating the proceedings as hereinbefore mentioned.

The case was argued before the supreme court of the state, and on the 19th of July it pronounced its judgment, affirming the decision of the associate justice discharging Booth from imprisonment, with costs against Ableman, the marshal. Afterwards, on the 26th of October, the marshal sued out a writ of error, returnable to this court on the first Monday of December, 1854, in order to bring the judgment here for revision; and the defendant in error was regularly cited to appear on that day; and the record and proceedings were certified to this court by the clerk of the state court in the usual form, in obedience to the writ of error. And on the 4th of December, Booth, the defendant in error, filed a memorandum in writing in this court, stating that he had been cited to appear here in this case, and that he submitted it to the judgment of this court on the reasoning in the argument and opinions in the printed pamphlets therewith sent.

After the judgment was entered in the supreme court of Wisconsin, and before the writ of error was sued out, the state court entered on its record, that, in the final judgment it had rendered, the validity of the act of congress of September 18, 1850, and of February 12, 1793, and the authority of the marshal to hold the defendant in his custody, under the process mentioned in his return to the writ of *habeas corpus*, were respectively drawn in question, and the decision of the court in the final judgment was against their validity, respectively. This certificate was not necessary to give this court jurisdiction, because the proceedings upon their face show that these questions arose, and how they were decided; but it shows that at that time the supreme court of Wisconsin did not question their obligation to obey the writ of error, nor the authority of this court to re-examine their judgment in the cases specified. And the certificate is given for the purpose of placing distinctly on the record the points that were raised and decided in that court, in order that this court might have no difficulty in exercising its appellate power and pronouncing its judgment upon all of them.

§ 333. *Statement of facts in United States v. Booth.*

We come now to the second case. At the January term of the district court of the United States for the district of Wisconsin, after Booth had been set at

liberty, and after the transcript of the proceedings in the case above mentioned had been returned to and filed in this court, the grand jury found a bill of indictment against Booth for the offense with which he was charged before the commissioner, and from which the state court had discharged him. The indictment was found on the 4th of January, 1855. On the 9th a motion was made, by counsel on behalf of the accused, to quash the indictment, which was overruled by the court, and he thereupon pleaded not guilty, upon which issue was joined. On the 10th a jury was called and appeared in court, when he challenged the array; but the challenge was overruled and the jury impaneled. The trial, it appears, continued from day to day, until the 13th, when the jury found him guilty in the manner and form in which he stood indicted in the fourth and fifth counts. On the 16th he moved for a new trial and in arrest of judgment, which motions were argued on the 20th, and on the 23d the court overruled the motions, and sentenced the prisoner to be imprisoned for one month, and to pay a fine of \$1,000 and the costs of prosecution; and that he remain in custody until the sentence was complied with. We have stated more particularly these proceedings, from a sense of justice to the district court, as they show that every opportunity of making his defense was afforded him, and that his case was fully heard and considered.

On the 26th of January, three days after the sentence was passed, the prisoner by his counsel filed his petition in the supreme court of the state, and with his petition filed a copy of the proceedings in the district court, and also affidavits from the foreman and one other member of the jury who tried him, stating that their verdict was, guilty on the fourth and fifth counts, and not guilty on the other three; and stated in his petition that his imprisonment was illegal, because the fugitive slave law was unconstitutional; that the district court had no jurisdiction to try or punish him for the matter charged against him, and that the proceedings and sentence of that court were absolute nullities in law. Various other objections to the proceedings are alleged, which are unimportant in the questions now before the court, and need not, therefore, be particularly stated. On the next day, the 27th, the court directed two writs of *habeas corpus* to be issued — one to the marshal, and one to the sheriff of Milwaukee, to whose actual keeping the prisoner was committed by the marshal, by order of the district court. The *habeas corpus* directed each of them to produce the body of the prisoner, and make known the cause of his imprisonment, immediately after the receipt of the writ.

On the 30th of January the marshal made his return, not acknowledging the jurisdiction, but stating the sentence of the district court as his authority; that the prisoner was delivered to, and was then in the actual keeping of, the sheriff of Milwaukee county, by order of the court, and he therefore had no control of the body of the prisoner; and if the sheriff had not received him, he should so have reported to the district court, and should have conveyed him to some other place or prison, as the court should command. On the same day the sheriff produced the body of Booth before the state court, and returned that he had been committed to his custody by the marshal, by virtue of a transcript, a true copy of which was annexed to his return, and which was the only process or authority by which he detained him.

This transcript was a full copy of the proceedings and sentence in the district court of the United States, as hereinbefore stated. To this return the accused, by his counsel, filed a general demurrer. The court ordered the hearing to be postponed until the 2d of February, and notice to be given to the

district attorney of the United States. It was accordingly heard on that day, and on the next (February 3d), the court decided that the imprisonment was illegal, and ordered and adjudged that Booth be, and he was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty.

On the 21st of April next following, the attorney-general of the United States presented a petition to the chief justice of the supreme court, stating briefly the facts in the case, and at the same time presenting an exemplification of the proceedings hereinbefore stated, duly certified by the clerk of the state court, and averring in his petition that the state court had no jurisdiction in the case, and praying that a writ of error might issue to bring its judgment before this court to correct the error. The writ of error was allowed and issued, and, according to the rules and practice of the court, was returnable on the first Monday of December, 1855, and a citation for the defendant in error to appear on that day was issued by the chief justice at the same time.

No return having been made to this writ, the attorney-general, on the 1st of February, 1856, filed affidavits, showing that the writ of error had been duly served on the clerk of the supreme court of Wisconsin, at his office, on the 30th of May, 1855, and the citation served on the defendant in error on the 28th of June, in the same year. And also the affidavit of the district attorney of the United States for the district of Wisconsin, setting forth that when he served the writ of error upon the clerk, as above mentioned, he was informed by the clerk, and has also been informed by one of the justices of the supreme court, which released Booth, "*that the court had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the court concerning the same.*" And upon these proofs, the attorney-general moved the court for an order upon the clerk to make return to the writ of error on or before the first day of the next ensuing term of this court. The rule was accordingly laid, and on the 22d of July, 1856, the attorney-general filed with the clerk of this court the affidavit of the marshal of the district of Wisconsin, that he had served the rule on the clerk on the 7th of the month above mentioned; and no return having been made, the attorney-general, on the 27th of February, 1857, moved for leave to file the certified copy of the record of the supreme court of Wisconsin, which he had produced with his application for the writ of error, and to docket the case in this court, in conformity with a motion to that effect made at the last term. And the court thereupon, on the 6th of March, 1857, ordered the copy of the record filed by the attorney-general to be received and entered on the docket of this court, to have the same effect and legal operation as if returned by the clerk with the writ of error, and that the case stand for argument at the next ensuing term, without further notice to either party. The case was accordingly docketed, but was not reached for argument in the regular order and practice of the court until the present term.

This detailed statement of the proceedings in the different courts has appeared to be necessary in order to form a just estimate of the action of the different tribunals in which it has been heard, and to account for the delay in the final decision of a case, which, from its character, would seem to have demanded prompt action. The first case, indeed, was reached for trial two terms ago. But as the two cases are different portions of the same prosecution for the same offense, they unavoidably, to some extent, involve the same principles of law, and it would hardly have been proper to hear and decide the first be-

fore the other was ready for hearing and decision. They have accordingly been argued together, by the attorney-general of the United States, at the present term. No counsel has in either case appeared for the defendant in error. But we have the pamphlet arguments filed and referred to by Booth in the first case, as hereinbefore mentioned, also the opinions and arguments of the supreme court of Wisconsin, and of the judges who compose it, in full, and are enabled, therefore, to see the grounds on which they rely to support their decisions.

It will be seen, from the foregoing statement of facts, that a judge of the supreme court of the state of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the state.

In the second case, the state court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court. And it further appears that the state court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of congress of 1789, to bring here for examination and revision the judgment of the state court.

These propositions are new in the jurisprudence of the United States, as well as of the states; and the supremacy of the state courts over the courts of the United States, in cases arising under the constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a state. The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of *habeas corpus*. But the paramount power of the state court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus*, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner and disregarding the writ of error from this court, can rest upon no other foundation.

§ 334. *A state court has no jurisdiction by habeas corpus to release a prisoner held by order of a federal court.*

If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts without the permission and according to the judgment of the courts of the state in which the party happens to be imprisoned; for, if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United

States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes from the highest to the lowest, including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen that an act which was admitted to be an offense, and justly punished in one state, would be regarded as innocent, and, indeed, as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the state court must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned.

It is, however, due to the state to say that we do not find this claim of paramount jurisdiction in the state courts over the courts of the United States asserted or countenanced by the constitution or laws of the state. We find it only in the decisions of the judges of the supreme court. Indeed, at the very time these decisions were made, there was a statute of the state which declares that a person brought up on *habeas corpus* shall be remanded, if it appears that he is confined, "1st. By virtue of process by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or 2d. By virtue of the final judgment or decree of any competent court of civil

or criminal jurisdiction." Revised Statutes of the State of Wisconsin, 1849, ch. 124, page 629.

Even, therefore, if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the supreme court claims to have derived from the state. But, as we have already said, questions of this kind must always depend upon the constitution and laws of the United States, and not of a state. The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the constitution by which this power is granted is too plain to admit of doubt or to need comment. It declares that "this constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power equally paramount in authority to carry it into execution; for if left to the courts of justice of the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the constitution and laws and treaties of the United States, and the powers granted to the federal government, would soon receive different interpretations in different states, and the government of the United States would soon become one thing in one state and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence) so carefully provided in the clause of the constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the general government in clear, precise and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a state or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the constitution itself was deemed essential to secure the independence and supremacy of the general government in the sphere of action assigned to it; to make the constitution and laws of the United States uniform and the same in every state, and to guard against evils which would inevitably arise from conflicting opinions between the courts of a state and of the United States, if there was no common arbiter authorized to decide between them.

The importance which the framers of the constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign states which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another state by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the states; for in the time that has already elapsed since this government came into existence, several irritating and angry controversies have taken place between adjoining states in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every state." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the state judges bound to carry it into execution. And as the courts of a state, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the states, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

The constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the federal government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this constitution" and the laws of the United States —

leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of congress, whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants in the constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the general government. And as the constitution is the fundamental and supreme law, if it appears that an act of congress is not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the constitution is under their view when any act of congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the states, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our government, state and national, would soon cease to be governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

In organizing such a tribunal it is evident that every precaution was taken which human wisdom could devise to fit it for the high duty with which it was intrusted. It was not left to congress to create it by law; for the states could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests and powerful political combinations, an act of congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the federal government, but by the people of the states, who formed and adopted that government, and conferred upon it all the powers, legislative, executive and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the constitution itself, and declared that this court should have appellate power in all cases arising under the constitution and laws of the United States. So long, therefore, as this constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon congress. That power is specifically given in article 1, section 8, paragraph 18, in the following words: "To make all laws which shall be necessary and proper to carry into execution the

foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”

Under this clause of the constitution it became the duty of congress to pass such laws as were necessary and proper to carry into execution the powers vested in the judicial department. And in the performance of this duty the first congress, at its first session, passed the act of 1789, chapter 20, entitled “An act to establish the judicial courts of the United States.” It will be remembered that many of the members of the convention were also members of this congress, and it cannot be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the twenty-fifth section of the act of 1789 congress authorized writs of error to be issued from this court to a state court, whenever a right had been claimed under the constitution or laws of the United States, and the decision of the state court was against it. And to make this appellate power effectual and altogether independent of the action of state tribunals, this act further provides that, upon writs of error to a state court, instead of remanding the cause for a final decision in the state court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

These provisions in the act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the first congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by states or state tribunals. In the case before the supreme court of Wisconsin, a right was claimed under the constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the district court of the United States, but it has reversed and annulled the provisions of the constitution itself and the act of congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of state court or judge who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party

is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a *habeas corpus* issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the states. The constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound, by oath or affirmation, to support this constitution. This is the last and closing clause of the constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the constitution was submitted to the people of the several states for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly

pledged than that which every state has plighted to the other states to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this constitution*. And no power is more clearly conferred by the constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them is denied by the highest judicial tribunal in the state.

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the state; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the state court has fallen, and the consequences to which they would inevitably lead. But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a state court.

§ 335. *Jurisdiction of district court in cases under fugitive slave law is final and exclusive.*

And as regards the decision of the district court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a state or the United States, by *habeas corpus* or any other process.

§ 336. *The fugitive slave law is constitutional.*

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the state court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law. We have already stated the opinion and judgment of the court as to the exclusive jurisdiction of the district court, and the appellate powers which this court is authorized and required to exercise. And if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise.

The judgment of the supreme court of Wisconsin must therefore be reversed in each of the cases now before the court.

EX PARTE FORBES.

(Circuit Court for Kansas: 1 Dillon, 363-367. 1870.)

STATEMENT OF FACTS.—Proceedings had upon *habeas corpus*. In 1854 a treaty was made with the Shawnee Indians, whereby each member of the tribe was allotted two hundred acres of the "Shawnee reservation." The

parents of all minors were to be allotted the shares of the latter for their benefit. An express condition, however, of the gift was that no allottee should alienate his land without the consent of the secretary of the interior. Under this treaty certain lands were patented to Sophia McLane, for the benefit of her daughter Mary. Petitioners were then in possession, and to them the said Mary McLane conveyed the lands. The conveyance was never, however, ratified by the secretary of the interior. One of the heirs of Sophia McLane, claiming to own an undivided half in the lands patented to her, instituted a proceeding in the district court of Wyandotte county for partition, denying that the petitioners had any rights therein, and alleging that they were committing waste thereon. An order was thereupon made restraining Forbes & Puckett from committing waste pending the partition suit. They violated this order and were thereupon committed to jail, from which imprisonment they now seek to be discharged.

§ 337. *The state court had no jurisdiction.*

Opinion by DELAHAY, D. J.

If it were necessary to a decision in this proceeding, that the jurisdiction of the state court of the subject-matter in controversy, in the proceedings before it, should be inquired into, it would be sufficient, in my opinion, to refer to the case of the Kansas Indians, 5 Wall., 737, in which the supreme court of the United States, speaking of the Shawnees, says: "As long as the United States recognize their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws." There can be no question of the applicability of this language to the suit in Wyandotte county, as it is made clearly to appear that the Shawnees still maintain their tribal relation to the United States, and are still recognized by the government as an Indian tribe or nation; and that the secretary of the interior never has approved the conveyances under which the petitioners claim. The deeds are entirely void until approved by that officer; and, until they are so approved, the lands of the Shawnees are as wholly beyond the jurisdiction of the state courts as if they were situated without its geographical limits, as will be seen by reference to the peculiar provisions of the act admitting Kansas as a state. See, also, *United States v. Ward*, 1 Woolw., 17.

§ 338. — *but a federal court has no jurisdiction in habeas corpus in case of one confined by order of a state court, unless the confinement be in violation of the constitution or laws of the United States.*

But that is not a question to be inquired into in this proceeding. The first question that it is necessary to consider is, whether a judge of a federal court has jurisdiction in the premises; and the legislation of congress, happily, has left no room for doubt upon that subject. The judiciary act of 1789 (Stats. at Large, 81, sec. 14) gave the general power to issue the writ, but, in a proviso, declared "that it in no case shall extend to prisoners in jail, unless when they are in custody under, or by color of, the authority of the United States; or are committed for trial before some court of the same; or are necessary to be brought into court to testify." The act of 1833 (4 id., 634, sec. 7) provides that the federal judges shall have the power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof." The act of 1842 (5 id., 539)

extended the power to courts where *aliens* were confined under state authority. The act of February 5, 1867 (14 id., 385), gave power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."

To be unmistakably explicit, it will be observed that congress did not stop with providing in what cases the writ might be issued by federal courts and magistrates. Certain cases are mentioned in which it shall not be allowed, conspicuous among which is the case where the applicant is in confinement under the laws of a state, by order of a court thereof. If he be confined contrary to the constitution and laws of the United States, the federal authorities may issue the writ. But the proofs in this case show distinctly and clearly that the petitioners were not in that category. They are in confinement, illegally perhaps, under the order of a state court in a matter, it may be, over which it had no jurisdiction; but that does not necessarily give them access to the federal judiciary, since they can administer no relief unless the case is provided for by federal legislation. Very manifestly, this case is not such an one; I am, therefore, obliged to set aside the writ heretofore allowed, and leave the petitioners in the custody of the sheriff of Wyandotte county.

Ordered accordingly.

§ 339. **Jurisdiction of state or federal court first acquiring it.**—The federal courts and the state courts in many cases have a concurrent jurisdiction. In such cases the court in which suit is first brought will take and retain jurisdiction; and if suit is brought in the other court, the pendency of a suit on the same subject-matter in the former court may be pleaded in abatement. *Rogers v. Cincinnati*, 5 McL., 339; *Presbyterian Church v. White*,* 4 Am. L. Reg. (O. S.), 526; *Earl v. Raymond*, 4 McL., 235. So, to avoid conflict between ministerial officers of the state and federal courts, the officer who first levies execution is entitled to a preference. *Earl v. Raymond*, 4 McL., 235.

§ 340. When a state court having concurrent jurisdiction of the subject-matter of a case with the federal court has already acquired complete jurisdiction of the case, the federal court will not interfere with the jurisdiction so acquired. *Parkes v. Aldridge*, 8 Fed. R., 223.

§ 341. When suit is instituted in the circuit court of the United States before a suit is begun in a state court of concurrent jurisdiction, relating to the same subject-matter, the circuit court will retain jurisdiction. *Wickliffe v. Owings*, 17 How., 52.

§ 342. When suit has been brought in a state court by a stock company, to wind up its affairs, a federal court will refuse to take jurisdiction of a similar action brought by a single stockholder of the company for the same purpose. *Memphis City v. Dean*, 8 Wall., 64.

§ 343. When a federal court and a state court have concurrent jurisdiction of the subject-matter of a suit, if the suit is begun in the federal court a subsequent proceeding by garnishment in the state court is no defense to the action in the federal court. *Greenwood v. Rector*, Hemp., 708.

§ 344. Of two creditors' bills, filed, one in the United States circuit court, the other in a state court, both directed against the property of the same person, and asking that a receiver take possession of it, the one which is first filed and served will take jurisdiction of the case and of the property, and this may be pleaded in defense to the other action. *Chittenden v. Brewster*, 2 Wall., 197.

§ 345. When a suit has been begun in a federal court, an attachment of the same debt on proceedings in a state court is not a bar to a recovery in the federal court. *Wallace v. McConnell*, 13 Pet., 151 (BILLS AND NOTES, §§ 1539-43).

§ 346. A bill for an injunction was filed in a federal court and notice was ordered to be served on the defendant. The latter then filed a bill in a state court praying for an injunction against plaintiff in matters cognate to the former bill. *Held*, the filing of the bill and passing of the order in the federal court gave jurisdiction, and the jurisdiction of the state court was ousted or must be exercised in subordination. *Shoemaker v. French*,* Chase's Dec., 267.

§ 347. A bill was filed in a state court to restrain the foreclosure of a mortgage, and later, on the same day, a bill was filed in the federal court to foreclose the mortgage. Process in both cases was served the next day, that of the federal court first in point of time. A third party interposed in the state court, claiming that the execution of the mortgage was a breach of

trust by which the property reverted to him. *Held*, that the federal court could decide all questions legitimately flowing out of the suit before it, and make a decree binding on the mortgagor. *Union Mut. Life Ins. Co. v. University of Chicago*,* 6 Fed. R., 442.

§ 348. Citizens of Louisiana and of Cuba, claiming as legatees under a will, filed a bill against the executors in the United States circuit court for Virginia, alleging that the executors had wasted the assets, and praying for an account. The executors pleaded that a suit was at the time pending in a court of the state for the settlement of the estate, to which all parties interested were parties; that the plaintiffs were made parties by order of publication under the laws of the state, and that the plaintiffs had personal knowledge that such suit was pending before they filed their bill. The plea was sustained, and the bill dismissed for want of jurisdiction. *Reid v. Kerfoot*,* Chase's Dec., 349.

§ 349. When a bill in equity is brought in a federal court, for the appointment of a receiver of a corporation, and on demurrer is held insufficient, but retained, and subsequently amendments are filed making a proper case for the appointment of a receiver, who is so appointed and takes peaceable possession, the fact that a state court had appointed another receiver on a similar bill, brought after the first bill in the federal court, but before the amendments were filed, will not oust the jurisdiction of the federal court. *Gaylord v. Fort Wayne, etc., R. Co.*, 6 Biss., 283.

§ 350. The United States circuit court has concurrent jurisdiction in equity with state courts when the controversy is between citizens of different states. In such cases the court which first takes jurisdiction of the subject-matter will keep it. Therefore, when a suit was brought in the circuit court to require an account of the residue of the administration of an estate which had been settled in the probate court of a state, and also to open the accounts already rendered on the ground of fraud, it was held that as to the first ground the subject-matter was in the jurisdiction of the state court, and had been acted on by it, but that the subject-matter of the second ground, *i. e.*, opening a settled account for fraud, was so far distinct from the subject-matter of simply settling probate accounts, that, as it had not been brought before the state court, the circuit court would take jurisdiction. *Mallett v. Dexter*, 1 Curt., 179. See §§ 322-328.

§ 351. When a state court and a federal court have concurrent jurisdiction of a suit, that court which first takes possession of the subject-matter will keep it, and a federal court will not entertain a suit affecting the possession of the subject-matter until the final decree in the state court has put the subject-matter of the suit out of the possession of that court; and if appeals are taken, and an order made by the supreme state court to be executed by the inferior court, the suit is not ended till such order has been carried out. While, however, a federal court will not interfere with the possession of the state court, it will inquire into the nature of that possession, and if a trust appears, will enforce that trust. *Watson v. Jones*, 13 Wall., 718 (CHURCHES, §§ 16-26).

§ 352. In all cases of conflict between the state and federal jurisdiction the rule is well settled that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res*, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction. And the proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure. The federal court, on the 20th of July, sustained a general demurrer to the complainant's bill, and entered judgment dismissing the suit. On the 22d of July Nickerson, a party to the first bill, filed his bill in the state court, and made his motion for a receiver. On the 24th of July, which was yet of the same term at which the demurrer was sustained, the order dismissing the cause was set aside on motion of the complainant's solicitors, and leave to amend and file a supplemental bill was given, and on the 25th of July Nickerson, by the consent of the defendant, obtained an order appointing receivers in the state court. *Held*, that the circuit court had not lost jurisdiction by its order of dismissal, and that order having been reversed, that the state court acquired no jurisdiction by its proceedings begun while the suit was technically dismissed. *U. T. Co. v. The Rockford, R. I. & St. L. R. Co.*, 7 Chic. L. N., 33. See §§ 284-287.

§ 353. Proceedings were begun in a federal court October 16th, and a receiver was appointed October 18th. On the 14th of the same month, like proceedings were begun in a state court by petition and summons, but no service was made. On the 18th, but after the appointment in the federal court, the state court appointed a receiver, basing its jurisdiction on the ground that by the Ohio code an action was commenced by a petition and summons. The receiver of the state court obtained possession, and a rule was issued against him by the federal court to show cause why he should not be attached for contempt. *Held*, that by a proper construction of the Ohio code, and by the weight of authority elsewhere, an action was begun for most pur-

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poses, and jurisdiction was acquired, only by service of process. *Bell v. Ohio Life and Trust Co.*, * 1 Biss., 260.

§ 354. In order to deprive the circuit court of jurisdiction of a case which has already been begun in a state court of concurrent jurisdiction, there must be an allegation of the actual pendency of such suit in the state court, and *it seems* that the objection should be taken by a plea in abatement. *Harvey v. Richards*, 2 Gall., 231.

§ 355. Although, in proper cases, the argument against jurisdiction of a federal court arising from its conflict with the state courts will be of weight, yet if a suit is begun in the federal court by competent parties, on a subject-matter cognizable by the court, it will not be justified in declining the jurisdiction. *Ibid.*

§ 356. *Lis pendens* in state court.—To sustain in a federal court a plea of *lis pendens* in a state court, it must generally be shown that the plaintiff in both cases is the same. *Certain Logs of Mahogany*, 2 Sumn., 592; *Wadleigh v. Veazie*, 3 Sumn., 166.

§ 357. The annual rendering of accounts to the probate court by trustees under a will, in accordance with statute, does not constitute a perpetual *lis pendens* so as to bar the jurisdiction of a court of equity over accounts filed subsequently to the bringing of the bill. *Parsons v. Lyman*, 5 Blatch., 170 (§§ 322-328).

§ 358. The circuit court of the United States has no jurisdiction of a bill in equity relating to legacies under a will which is probated in a state court of probate, and while that court is administering the estate. *Haines v. Carpenter*, 1 Woods, 268.

§ 359. *Res adjudicata* in state or federal court.—If two courts-martial, one federal, the other state, have concurrent jurisdiction, a sentence of condemnation in one may be pleaded in bar of a criminal prosecution in the other. *Houston v. Moore*, 5 Wheat., 31 (CONST., §§ 161-190.)

§ 360. A suit in admiralty on a maritime lien for advances to the master of a vessel is not barred by the fact that the libellant has previously begun an action at common law in a state court to recover the amount of the same advances. There can be no *res judicata* till a judgment is rendered. *The Kalorama*, 10 Wall., 218.

§ 361. The reversal of the judgment of the probate court by the supreme court of the state, on appeal, does not operate either as a bar or estoppel in a suit in the circuit court of the United States by one of the parties to the probate suit, because a reversal affirms nothing in regard to the facts of a case, but only declares that the former judgment or decree shall be null and void. *Harvey v. Richards*, 2 Gall., 231.

§ 362. *Custody of property as between state and federal courts.*—Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, and no other court has a right to interfere with that possession, unless it be some court that may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. *Buck v. Colbath*, 3 Wall., 341.

§ 363. Property which a sheriff has seized on process of a state court, and released to the claimant on his giving bond, is still in custody of the law, and is not subject to process of a federal court. *Hagan v. Lucas*, 10 Pet., 400.

§ 364. When property is in possession of the federal courts, no proceedings instituted in state courts, unless with authority of the federal courts, can affect the property. *Western U. Tel. Co. v. Atlantic & Pac. Tel. Co.*, 7 Biss., 370.

§ 365. When a vessel has been attached and taken into his possession by the sheriff of a state court, it cannot be subsequently attached by the marshal of this court. *The Celestine*, 1 Biss., 1.

§ 366. Where property has been taken possession of by the state court, it cannot be levied upon by the United States court. *Fox v. Hempfield R. Co.*, 2 Abb., 151.

§ 367. When a state court has seized the property and franchises of a railroad company to levy execution upon them, the same property and franchises cannot be levied upon by mortgage bondholders of the road, under judgment and execution of the circuit court of the United States. The first levy, whether made under the federal or state authority, withdraws the property from reach of the other process. *Ibid.*

§ 368. The rule that property *in custodia legis* by a state court is beyond the jurisdiction of the federal courts does not apply to prior suits pending in the federal court. Hence when successive mortgagees had filed bills in the circuit court to foreclose, and a receiver had been appointed in the first suit, the court held it had jurisdiction of a bill by the assignees in bankruptcy, appointed subsequently to the other suits, for the sale of the whole property. *Sutherland v. Lake Superior, etc., Co.*, * 1 Cent. L. J., 127.

§ 369. Certain property having been taken from the plaintiffs in a writ of replevin, which had been given them under that writ by the United States marshal in bankruptcy proceed-

ings against Davidson, on a motion by the plaintiffs for a summary order, directing the assignee to return the property, it was held that as the plaintiffs were private parties there was no conflict between the marshal and the officers of the state court, and that the plaintiffs' proper remedy was by action at law against the marshal or assignee, or perhaps by a bill in equity or by a petition. *In re Davidson*, 2 Ben., 506.

§ 370. The district court has jurisdiction of a proceeding to establish the forfeiture of a vessel fitted out to engage in the slave-trade, although at the time of the service of the motion she is in the hands of a sheriff of a state court under a process of attachment issued from the state court; for whenever the forfeiture is made absolute by an act of congress, the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of all title *eo instanti*, and the same becomes vested in the United States. And second, because possession by the sheriff under a civil process, whether from a state or federal court, will not defeat the operation of the revenue laws of the United States or the laws imposing forfeiture for engaging in the slave-trade, or fitting, equipping or preparing vessels for that purpose. *United States v. Bark Reindeer*, 2 Cliff., 57.

§ 371. When judgments are obtained on different claims against a defendant, one in a state court and one in the United States district court sitting in the same state, and the executions issued are levied on the same property, if the state execution is actually executed by a sale of the property before the district court execution is levied, it gives the purchaser a valid title discharged of the other execution lien, although that is attempted to be perfected by levy after the sale. *Pulliam v. Osborne*, 17 How., 471.

§ 372. An attachment of goods under process from a state court is a valid excuse for a carrier not delivering them, and will be so held in the federal courts. *Stiles v. Davis*, 1 Black, 104 (CARRIERS, §§ 1156-57).

§ 373. When a vessel is under attachment by process from a state court, it cannot be seized on a libel from the admiralty court. *Taylor v. Carryl*, 20 How., 587; *Fisher v. Brig Plymouth*,* 2 Int. Rev. Rec., 109.

§ 374. A vessel in possession of a state court was seized by a marshal on a libel in the district court. *Held*, that the vessel was beyond the reach of process from a federal court; but that the libel need not be dismissed if the libellant desired it to be retained. *The Oliver Jordan*,* 2 Curt., 414.

§ 375. Whether a vessel in possession of a sheriff, on the levy of an execution issuing from a state court, can be seized by the United States marshal on a libel in admiralty. *quære*. If the sheriff abandons possession to the marshal, and the execution creditor acquiesces in the seizure, and appears by petition in the admiralty court, to enforce his debt, he is precluded from questioning the jurisdiction of the court. *The Florenzo*, Bl. & How., 65.

§ 376. Where the state and federal courts have concurrent jurisdiction, the court which first takes jurisdiction of the subject will keep it. When a vessel is properly attached by a sheriff under process of a state court to enforce the payment of a debt against the boat, the boat cannot be taken from his possession by the United States marshal, under process from the admiralty court. *The Celestine*, 1 Biss., 2.

§ 377. *It seems* that if a sheriff, under process of a state court against A., seizes a ferry-boat belonging to B., and puts in a keeper, the boat is not in the custody of the sheriff so as to oust the jurisdiction of a court of admiralty whose marshal takes possession of the boat under process directed against the boat. *The Ferry-boats Roslyn and Midland*, 9 Ben., 133.

§ 378. When an action of replevin is begun in a state court, and possession of the property has been taken by the state court, a libel in admiralty cannot be filed in the United States district court sitting in admiralty, relating to the same property. When a federal and a state court have concurrent jurisdiction, the one which first assumes jurisdiction and seizes the property will keep it. *Taylor v. The Royal Saxon*, 1 Wall. Jr., 326.

§ 379. Where a ferry-boat was seized by a sheriff under attachment from a state court, and put in charge of a keeper, and subsequently a United States marshal seized the same boat and put in a keeper, and afterwards a receiver of the property of the company to which the boat belonged procured an order in the state court declaring the possession of the sheriff to be ended, and that the property should be delivered to the receiver, and the receiver on the next day came to take possession of the property, it was held by the admiralty court that the sheriff's possession being ended, the marshal's possession was in force, and the possession of the receiver must be postponed to that. *The Ferry-boats Roslyn and Midland*, 9 Ben., 135.

§ 380. The cases do not go the length of holding that a prior levy by a sheriff under color of an execution out of a state court, whether such be fraudulent, collusive or void, and without regard to the nature of the custody maintained, and whether the state tribunals adopt or repudiate the sheriff's action, is of its own force, and under all circumstances, absolute protection against the process of the admiralty directed against the property itself, issued in a

proceeding *in rem* to enforce a maritime lien confessedly superior to all other subsisting rights in the property. *Ibid.*

§ 381. When a vessel has been seized by a sheriff under a process of foreign attachment issuing from a state court, she cannot be taken from the custody of the sheriff by the United States marshal on a libel in admiralty. But it was held that, when a vessel which put into port from stress of weather was immediately seized by the revenue officer for violating the laws against slave-trading, and put in custody of an officer, the subsequent seizure by a sheriff under attachment process did not take her from the custody of the United States officer, and that the marshal might subsequently take her from the sheriff on a libel. *The Slavers (Reindeer)*, 2 Wall., 401.

§ 382. A ship was seized by a sheriff on a warrant issuing from a state court under the lien laws of New York. Subsequently proceedings in admiralty were begun against the vessel in the district court for the southern district of New York. The vessel was sold by the sheriff, the purchaser paying down twenty per cent. of his bid, and having knowledge of the admiralty proceedings. The purchaser petitioned the district court that the marshal be directed to surrender the vessel to him. *Held*, that a purchaser at the sheriff's sale with notice of the admiralty proceedings could not ask the federal court to deliver the property to him, but should apply to the state court, and that the question whether the possession of the sheriff was such as to bar the jurisdiction of the federal court for all purposes could not be decided by this summary method. *The Circassian*,* 1 Ben., 129.

§ 383. In the above case admiralty proceedings were subsequently begun in the district court for the eastern district of New York, whereupon the marshal of the southern district filed a petition in the eastern district court, setting forth that he had been disturbed in his possession by the marshal of the eastern district and praying the court to settle the priorities. *Held*, that the marshal's return in the southern district, to the effect that when he made seizure the vessel was in custody of a sheriff of the state court, was not such a return as would give his court jurisdiction, even though the sheriff's warrant, which on its face was valid, should prove to be void. *Ibid.*

§ 384. In the above case the suit in the eastern district was settled and new admiralty proceedings were begun. Upon the return of process, among other claimants appeared the sheriff of the state court, who set out his possession and sale under the state court, and prayed to defend accordingly. Upon motion by the libellant that the claim be stricken out, *held*, that it was very doubtful if the sheriff could, by becoming a party to a proceeding *in rem*, bring before this court the proceedings of the state court for adjudication as to their validity; that any determination this court might reach upon the issue would be nugatory, and that the sheriff should either apply to his own court for protection or bring the facts before this court by petition and pray the court to instruct its officer to withdraw from the vessel. *Ibid.*

§ 385. A state court cannot attach a steamer in the custody of the marshal in a proceeding in admiralty. *The Croatan*,* Chase's Dec., 546.

§ 386. A. and B. were partners. A. filed a bill in equity against B. in a state court, to dissolve the partnership and for a receiver, who was appointed and took possession of the property. A. and B. were then put into involuntary bankruptcy by the petition of a creditor in the district court of the United States for that state. The assignee was resisted by the receiver, in his attempts to get possession of the property, and then made application to the district court for an order to the receiver to give up the property. It was held that as the court appointing the receiver had jurisdiction of the subject-matter of the case and of the parties, the district court would not interfere with the possession of the receiver. *In re Clark*, 4 Ben., 96.

§ 387. A federal court cannot appoint a receiver of property which has already been properly delivered to a receiver appointed by a state court. *Blake v. Alabama & Chatt. R. Co.*,* 6 N. B. R., 331. Nor when it has been delivered to a receiver appointed by another federal court, S. C., 7 N. B. R., 168.

§ 388. After a party has been appointed receiver by this court, and has become fully vested with the title to, and possession of, the property in question (real estate in this instance), any attempt to disturb his possession by proceedings in the state court (in this instance to enforce a mechanic's lien), without first obtaining the leave of this court, is a contempt of this court. *De Visser v. Blackstone*, 6 Blatch., 235.

§ 389. When one is appointed receiver of a bank by a state court, and as such takes and holds the assets of the bank, the assets are considered as in the custody of the bank, and that court having obtained jurisdiction of the distribution of that property, the circuit court of the United States has no jurisdiction of a suit based on a claim against those assets. *Peale v. Phipps*, 14 How., 372.

§ 390. A federal court will not entertain a bill in equity against stockholders of an insolvent corporation for a fraudulent misappropriation of a part of the assets, when the concern is in the hands of a receiver appointed by a state court. *Hamilton v. Chouteau*,* 2 McC., 509.

§ 391. Proceedings were begun in a state court of Missouri, under a statute, for the dissolution of an insurance company and the appointment of a receiver. After the beginning of the proceedings, and before the decree of dissolution, a suit was begun and a judgment obtained against the company in the federal court. On a motion in the federal court for an execution and an order on the receiver, *held*, that the decree of dissolution placed in custody of the state court all assets of the company, as of the day of petition filed, and the judgment in the federal court was, like any other demand, subject to be allowed on presentation in the state court. *Levi v. Columbia Life Ins. Co.*,* 1 McC., 34.

§ 392. *Replevin in state court—Admiralty suit.*—A suit in replevin in a state court will not prevent an admiralty court from proceeding *in rem* to enforce a lien on the property. *Certain Logs of Mahogany*, 2 Sumn., 592.

§ 393. *Receiver of state court sued in federal court.*—A bill by a stockholder of a railroad, brought in the circuit court of the United States, against the receiver of a railroad appointed by a state court and the railroad company, is bad on demurrer, as the receiver cannot be sued except in the court in which he was appointed, and the railroad property also being in the jurisdiction and possession of the court, the company cannot be sued in the federal court. *Conkling v. Butler*, 4 Biss., 24.

§ 394. *Injunction by federal upon state court or its officers, and vice versa.*—A federal court cannot stop legal proceedings in a state court by injunction. *City Bank v. Skelton*, 2 Blatch., 18; *Slaughter House Case*, 1 Woods, 34.

§ 395. A federal court cannot interfere by injunction to prevent a sheriff from selling on execution property which he has already seized under execution from a state court. *Daly v. The Sheriff*, 1 Woods, 176.

§ 396. When an injunction sought in a federal court would be effectual only by barring the progress of a suit in a state court, the federal court has no jurisdiction to grant such an injunction. *Chaffin v. St. Louis*, 4 Dill., 23.

§ 397. A state court has no jurisdiction to enjoin a judgment of the circuit court. *M'Kim v. Voorhies*,* 7 Cr., 279.

§ 398. A federal court cannot by injunction interfere with the disposition of property in the hands of a receiver appointed by a state court and acting under its orders. *Hutchinson v. Green*,* 2 McC., 471.

§ 399. A state court has no power to enjoin the levying of an execution issuing from a federal court. *Roshell v. Maxwell*,* Hemp., 25.

§ 400. Though a writ of injunction will not be granted by a federal court to stay proceedings in a state court, yet an injunction will be granted to restrain a sheriff from laying or continuing an attachment which he is not authorized by the state law to make. *Cropper v. Coburn*, 2 Curt., 468.

§ 401. The circuit court of the United States has no jurisdiction to enjoin the prosecution of an action of trespass in a state court, against the marshal of this court, for taking the goods of one person upon execution against another. And a restraining order issued upon the filing of such a bill is not merely irregular but void for want of jurisdiction. *Evans v. Pack*, 7 Cent. L. J., 409. See §§ 270-273.

§ 402. Property consisting of a chapel, school-house, and on an Indian reservation, was replevied under a writ from a state court. The defendant subsequently filed a bill in equity in the federal court to enjoin the plaintiff from taking possession of, holding or intermeddling with the property in question. *Held*, that the effect of this injunction would be to stay proceedings in the state court, and that this was beyond the power of the federal court, although the plaintiff in the injunction suit claimed the property for the purposes of a public charity. *Domestic, etc., Missionary Society v. Hinman*,* 2 McC., 543.

§ 403. By sec. 720, R. S. U. S., the United States courts are prohibited from granting a writ of injunction to stay proceedings in a state court except in cases where the bankruptcy law provides otherwise. Under this statute, the circuit court has no jurisdiction to grant an injunction to stay proceedings in the probate court of a state, in which proceedings a national bank has been summoned under a state statute to produce its books of account and deposit and disclose the names of its depositors and the amount of deposits. *First Nat. Bank of Youngstown v. Hughes*, 6 Fed. R., 737.

§ 404. When a sheriff attempts by violence to prevent a United States marshal from performing his duties as an officer of the federal courts, a writ of injunction will issue from such courts to restrain the sheriff. *Crane v. McCoy*, 1 Bond, 428.

§ 405. The indorser of a promissory note sued the maker in a state court. The defendant then brought a bill in equity in another state court to enjoin the plaintiff from proceeding. This was removed into the federal court and an injunction granted. *Held*, that the federal court could not enjoin proceedings in a state court, and the decree was reversed. *Diggs v. Wolcott*,* 4 Cr., 179.

§ 406. Injunction by state as against mandamus from federal court.—When a federal court has issued a *mandamus* to state officers to perform certain acts, it will also punish them for contempt if they, in obedience to an injunction from a state court, refuse to perform those acts. *United States v. Supervisors of Lee County*,* 9 Int. Rev. Rec., 25.

§ 407. A town issued bonds to aid a railroad and levied a tax to pay them. A bondholder obtained judgment in the circuit court of the United States, and sued out a *mandamus* to compel the town to pay the judgment. To this the town returned that an injunction had been issued by the state court to prevent their paying the judgment. This return was upheld by the circuit court, but the decision was reversed by the supreme court, on the ground that a state court could not interfere with the enforcement of a judgment of a federal court. *United States v. Council of Keokuk*, 6 Wall., 515.

§ 408. Where a county issued bonds to help a railroad, and authorized a tax to pay interest, and a bondholder brought suit for interest in the United States circuit court, and got judgment, and obtained a *mandamus* to the county officers to levy a tax to pay the judgment, it was held that an injunction by a state court on the county officers, forbidding them to levy the tax because the vote authorizing it was illegal, was no defense to them for not obeying the *mandamus*. *Supervisors v. Durant*, 9 Wall., 417.

§ 409. When judgments have been recovered in the United States circuit court against a county on bonds issued by the county to assist a railroad, a *mandamus* will issue from the court to the county officers to levy and collect taxes to satisfy the judgment. If it appears that, from public excitement or disturbance, they are unable to collect the tax, the court will empower the United States marshal to perform the same duties. No injunction by the state courts can prevent the execution of this order. *United States v. Muscatine County*, 2 Abb., 53.

§ 410. Mandamus by federal court upon county officers.—When a federal court issues a *mandamus* requiring county officers to levy and collect a tax, they will be in contempt if they do not collect such tax, though a state court has given a decree annulling the levy made by them. *United States v. Silverman*, 4 Dill., 226.

§ 411. Habeas corpus by state court where one is confined under federal authority, and vice versa.—When the return on a writ of *habeas corpus* issued by a state judge shows that the prisoner is lawfully detained under federal authority, the state judge cannot discharge the prisoner; the federal authority in such case is paramount to that of the state. *Norris v. Newton*, 5 McL., 97. See §§ 332-333.

§ 412. When a person is kept in confinement as a soldier of the United States army, by the proper officer of that army, a state court has no authority to inquire into the validity of the enlistment by which he became a member of that army; but if these facts are returned upon a writ of *habeas corpus* sent out by the state court, that court should upon this return dismiss the application and leave the prisoner to the federal authorities. *Tarble's Case*, 13 Wall., 401.

§ 413. Where the courts of the United States and of a state have concurrent jurisdiction, the court which first take jurisdiction keeps it. A person confined by the United States court, under due process, cannot be liberated on *habeas corpus* issued from a state court. *United States v. Doss*,* 11 Am. L. Reg. (N. S.), 320.

§ 414. A state court issued a writ of *habeas corpus* for an enlisted soldier in the federal army. His commander returned that he kept the soldier under authority of the United States. The state court, however, proceeded to try the enlistment, declared it invalid, and ordered the commander to discharge the soldier. He refused to do so and was arrested for contempt by the state court. On application by him to the United States district court on *habeas corpus*, that court held that the state court had no jurisdiction over the case, and that when the return showed that the soldier was held under the laws of the United States, that should have been adjudged a sufficient authority to keep him. *In re Farrand*, 1 Abb., 141.

§ 415. A United States marshal and a district attorney were imprisoned by a state court for contempt in not delivering certain ballot-boxes, polling lists and other paraphernalia of elections to the court when ordered. The officers held this property by order of the circuit court, as part of the subject-matter of suits for illegal voting, then pending in the circuit court. It was held that under section 753 of the United States Revised Statutes, the officers were entitled to be discharged on writ of *habeas corpus* from the circuit court. *Ex parte Turner*, 3 Woods, 604.

§ 416. If a person is held in custody under the laws of a state, he cannot be released from that custody, if it is lawful, by a *habeas corpus* from a federal court. *Norris v. Newton*,* 7 West. L. J., 521.

§ 417. By act of congress of 22d March, 1833, the judges of the district court may issue a writ of *habeas corpus* in all cases where a prisoner in jail is committed for an act done in pursuance of a law of the United States. *Held*, that under this act a writ would issue to the constable of

a state who had a United States marshal under arrest for violence offered to a negro in order to arrest him under the fugitive slave law. *Ex parte Jenkins*, 2 Wall. Jr., 525.

§ 418. **Jurisdiction of federal court where there is a concurrent jurisdiction in state court not exercised.**—If a case is brought before a federal court over which it has complete jurisdiction, the fact that a state court has concurrent jurisdiction will not authorize the federal court to decline jurisdiction. *Tobey v. County of Bristol*, 3 Story, 818 (ARBITRATION, §§ 63-71).

§ 419. The federal courts may take jurisdiction of the accounts of executors, as courts of equity, in a proper case, although a probate court of a state has jurisdiction of similar cases, provided the subject-matter of the case in question has not already been brought before the state court. *Allen v. Allen*,* 14 Leg. Int., 148.

§ 420. The fact that the orphans' court in Pennsylvania has by law an equity jurisdiction over certain accounts, etc., exclusive of all other courts of the state, does not take away the concurrent jurisdiction of the circuit court as a court of equity over the same matters. *Allen v. Allen*,* 3 Wall. Jr., 248.

§ 421. When a citizen of one state brings a bill in equity in the circuit court, as a creditor of a partnership, against the representatives of a deceased partner, to compel an account of the partnership property, and for the appointment of a receiver to take possession of the property, the fact that the probate court in which such representatives are settling the estate has full jurisdiction to settle all the partnership accounts, does not compel the non-resident creditor to abandon his bill in the federal court, and pursue his claim in the state court. *Fiske v. Gould*, 12 Fed. R., 373.

§ 422. The jurisdiction of the circuit court to appoint a receiver of an insolvent insurance company upon a bill brought by a citizen of another state is not defeated by the fact that a bill for the same purpose has been filed by another creditor in the state court, but not brought to issue, nor by a bill made out but not filed in the state court, by a trustee to whom the company has conveyed all its property in trust for creditors. *Buck v. Piedmont, etc., Ins. Co.*, 4 Fed. R., 851.

§ 423. An action was brought by non-residents of the state, in the circuit court, against receivers of a railroad appointed by a state court, to enforce liens on rolling stock and earnings pledged by the receivers. In the decree of the state court authorizing the pledging, it was provided that, in case of default by the receivers, the holders of the notes might apply to that court for a summary order, and this part of the decree was printed on the notes. *Held*, that there was nothing in the fact that a party might apply to the state court to prevent him from applying to the circuit court; and that the fact that property was being administered in state proceedings did not prevent citizens of other states from proceeding in a federal court to establish claims and obtain relief where entitled to it. *Griswold v. Central Vermont R. Co.*,* 9 Fed. R., 797.

§ 424. In an equity cause brought in a federal court, that court will keep its jurisdiction if it has cognizance of the subject-matter, although the state court may have concurrent jurisdiction, if the matter was first laid before the federal court. In its equity proceedings the federal court is not governed by the laws and practice of the state where it is sitting, but by the rules of chancery. *Burt v. Keyes*,* 3 West. L. Mo., 294.

§ 425. The circuit court of the United States has jurisdiction of a bill in equity to reopen an account in a probate office in another state, although by the state law exclusive authority over probate accounts is given to the probate court. The only test of the equity jurisdiction of a federal court is whether or not the law side of the court affords a plain, adequate and complete remedy. *Payne v. Hook*, 7 Wall., 425.

§ 426. The federal courts have jurisdiction of a suit by a legatee against an administrator co-extensive with the jurisdiction of courts of equity, although a state court may have concurrent jurisdiction of the same cases. *Pratt v. Northam*, 5 Mason, 105.

§ 427. The circuit court has concurrent jurisdiction with the probate court to enforce against an executor the payment of a judgment obtained against the testator in his life-time, and subsequently sued upon in such circuit court, and judgment obtained thereon against the executor. *Chapman v. Borer*,* 1 McC., 50.

§ 428. **Where suit in federal court does not interfere with suit in state court touching same matter.**—When a federal court has before it a suit which touches the same subject-matter as a suit before a state court of concurrent jurisdiction, if the federal court can make a full disposition of the case before it, without disturbing the possession of the state court, or its control over the subject-matter of the suit, it will retain jurisdiction of the case. *Andrews v. Smith*, 19 Blatch., 101.

§ 429. Although where a United States court and a state court have concurrent jurisdiction, the court which first acquires jurisdiction of the subject-matter will retain it, yet if the other court can proceed without interfering with the possession or jurisdiction of the

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first court, it will do so and will not dismiss the case before it. *Logan v. Greenlaw*, 12 Fed. R., 18.

§ 430. When a United States marshal, who had taken on attachment, in a suit in the circuit court, goods not belonging to the defendant named in his process, was sued by the owner of the goods for trespass, and, after decision for plaintiff, removed the case to the supreme court of the United States on a writ of error, it was there held that the suit in the state court did not interfere with the suit in the federal court under which the goods were attached. *Buck v. Colbath*, 3 Wall., 342.

§ 431. While it is true that when a state court and a federal court have concurrent jurisdiction, the court which first takes jurisdiction will keep it, yet when a suit is brought in a federal court, affecting a right to property which is in the possession of the state court, in process of litigation, but not affecting the possession of the property, the federal court will settle such right and not compel the parties to go to the state court. *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatch., 326.

§ 432. **Revisory jurisdiction of federal court over state court.**—A federal court cannot revise errors in the orders and findings of a state court, if that court had jurisdiction of the subject-matter of the case before it and of the parties. *Colt v. Colt*, 19 Blatch., 465.

§ 433. The circuit court of the United States will not review the decisions of a state court of general jurisdiction which has decided a cause properly brought before it, and of which it had jurisdiction both as to parties and subject-matter. *Randall v. Howard*, 2 Black, 587.

§ 434. A federal court will never review the judgment of a state court upon a case properly before it and of which it has jurisdiction, merely because the party asking for review declares the judgment to be contrary to some state law. Nor have the federal courts jurisdiction over the settlement of insolvencies in the state courts. *Adams v. Preston*, 22 How., 488.

§ 435. Except as specially enacted by congress, the state and federal courts are entirely independent of each other, and one cannot enjoin or restrain the proceedings of the other. Instances where a federal court has a revisory jurisdiction of state court proceedings are where a state court decides against the validity of some law or treaty of the United States, or in suits between citizens of different states. *Rogers v. Cincinnati*, 5 McL., 339.

§ 436. **Annulling a will.**—The circuit court of California will not entertain a bill to annul a will and its probate on the ground of forgery, the probate court of California which granted the probate having had full power to grant the relief sought here, while the proceedings instituted for proving the will were pending and for a year afterwards. *Case of Broderick's Will*, 21 Wall., 503.

§ 437. **Between federal and federal.**—If a vessel seized by the marshal of one district is wrongfully seized and taken into another district, and is there seized by the marshal of that district, the second seizure is void and the court will order the vessel returned. *The Brig Joseph Gorham*,* 2 N. Y. Leg. Obs., 388.

§ 438. This court has power to prohibit a non-resident plaintiff from proceeding against a defendant resident within the state, in the federal courts. It seems that it would not exercise such authority over a state court. *City Bank of New York v. Skelton*, 2 Blatch., 26.

§ 439. The pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in a circuit court or in the court below, even though the two suits are for the same cause of action. *Stanton v. Embrey*, 3 Otto, 554 (ATT'YS, §§ 226-231).

§ 440. If a suit is pending in a circuit court of the United States against one who is declared a bankrupt under the national bankrupt act, such adjudication does not oust the jurisdiction of the circuit court, if it has proper jurisdiction of the parties, the subject-matter and the controversy. *Burbank v. Bigelow*, 2 Otto, 181.

§ 441. On a libel in admiralty to enforce a maritime lien, it was held that proceedings in voluntary bankruptcy, which had previously been instituted in another district, were no bar to the jurisdiction of this court, the lien sought to be enforced having been created prior to the petition, and the vessel not having been taken into the possession of the court in bankruptcy. *The Ironsides*, 4 Biss., 518.

§ 442. A decree of foreclosure was rendered in the district court of Wisconsin while possessing circuit court powers. Later, in the same year, the act of July 15, 1862, established a circuit court in that district, and deprived the district court of circuit court powers. The marshal made his return of sale to the circuit court in October, 1862. In January, 1863, the court set aside the sale and ordered another. March 3, 1863, congress authorized district courts, when they had rendered final judgments or decrees as circuit courts prior to July 15, 1862, to issue writs of execution, etc., to enforce such judgments or decrees. The marshal made a second sale in April, 1863, and made his return to the district court. On the refusal of an application in the circuit court for a rule to have the return made to that court, it was held by the supreme court that, by a proper construction of the act of March 3, 1863, the powers conferred on district courts were only such as were necessary to control the ministe-

rial duties of officers in the execution of final powers; that the act of confirming or setting aside a sale involved the exercise of judgment, and hence was not within the powers given the district courts. *Milwaukee R. Co. v. Soutter*,* 5 Wall., 660.

§ 443. **Law and equity.**— Courts of law and courts of equity have concurrent jurisdiction of fraud. *Russell v. Clark*, 7 Cr., 89; *Swayze v. Burke*, 12 Pet., 23.

§ 444. A party defeated in a suit at law cannot, by merely charging fraud upon his opponents, obtain a trial in equity on the ground that courts of equity have concurrent jurisdiction with courts of law in matter of fraud, since in cases of concurrent jurisdiction the court first taking cognizance of the case must determine it conclusively. *Smith v. M'Iver*,* 9 Wheat., 532.

§ 445. **Miscellaneous.**— Where several parties set up conflicting claims to property, with which a special tribunal may deal as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. *Garland v. Wynn*, 20 How., 7.

§ 446. The circuit court judges feel obliged to follow not only previous decisions in their own circuit in cases similar to the one before them, but decisions of other circuits in similar cases. *Goodyear Dental Vulcanite Co. v. Willis*, 1 Flap., 390.

§ 447. It is a rule absolutely necessary to be observed by courts who have a concurrent jurisdiction, that in all cases where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be taken away by proceedings in another court. *Orton v. Smith*, 18 How., 265.

§ 448. As between two courts of concurrent jurisdiction, *e. g.*, two circuits of the United States circuit court, the court which first acquires jurisdiction of the subject-matter will retain it, and another court will not interfere. *Davis v. Life Association of America*, 11 Fed. R., 788.

3. *Affected by Judgments of Other Courts.*

SUMMARY— *Erroneous judgments binding*, § 449.— *Presumptions of jurisdiction*, §§ 450, 451.— *Errors to be corrected by same court*, § 452.— *Jurisdiction may be inquired into*, § 453.— *Failure through defective service*, § 454.— *Failure through want of parties*, § 455.— *Judgment to be reversed only in same court*, § 456.— *Jurisdiction dependent on the record*, §§ 457, 458.— *Sufficient record*, § 459.— *General and limited jurisdiction*, § 460.— *Decision upon the jurisdiction binding everywhere*, § 461.— *Erroneous judgment of competent court*, § 462.— *Decree of orphans' court*, § 463.— *Acts beyond the jurisdiction are void*, § 464.— *Judgment without opportunity to be heard*, §§ 465-467.

§ 449. Where a court has jurisdiction of a cause, all its proceedings, however erroneous, are valid until reversed in some direct proceeding. *Harvey v. Tyler*, §§ 468-474.

§ 450. In case of proceedings of courts of general jurisdiction, all presumptions not inconsistent with the record are adjudged in favor of jurisdiction. *Ibid.*

§ 451. When new powers, conferred by statute, are to be brought into exercise in the usual form of common law or chancery proceedings, the same presumptions will be made in favor of jurisdiction, but new powers may be conferred to be exercised in a special manner, in which the order or judgment must be supported by a record showing affirmatively that the court had jurisdiction. *Ibid.*

§ 452. Where proceedings in another court are collaterally drawn in question, and it appears from the record that the court had jurisdiction, the judgment of that court is conclusive until reversed, and any errors may be corrected only in the same or in an appellate court. *Thompson v. Tolmie*, §§ 475-479.

§ 453. The jurisdiction of any court may be inquired into where a right or benefit is claimed under its proceedings. *Gray v. Larrimore*, §§ 480-485.

§ 454. Where a defendant resided in another state, and the statute, as to service by publication, was not strictly followed, the court was without jurisdiction. *Ibid.*

§ 455. In a suit to settle the affairs of a partnership, all the legal representatives of a deceased partner are necessary parties, and a decree determining their rights was held invalid as to all, when it appeared that one of them was not within the jurisdiction of the court. *Ibid.*

§ 456. A proceeding between the original parties to a suit in a state court to set aside a judgment on the grounds that defendant was not served with notice, and that he had been discharged as a bankrupt, must, according to the Louisiana code, and according to common law practice, be brought in the same court. A federal court could not entertain jurisdiction of such a proceeding, were it removed thither, although the parties were citizens of different states. *Barrow v. Hunton*, §§ 486-488.

§ 457. Where the averments of citizenship were sufficient to give the federal court jurisdiction, and under a judgment in the case the marshal made a sale of property, the purchaser's title cannot be invalidated by proof in collateral proceedings that the averments were untrue, so that the court had not jurisdiction. *Erwin v. Lowry*, §§ 489-495.

§ 458. While the record of a judicial sale must show strict compliance with prescribed forms, it is sufficient if it appear that the debtor by his conduct estopped himself from future objection. *Ibid.*

§ 459. Where a court had power to order the sale of a decedent's estate, and the record shows that a petition was filed for this purpose, and sets out the order of court granting the petition, *held*, that this was a binding adjudication, establishing the existence of all facts necessary to support the jurisdiction of the court in the particular case. *Grignon v. Astor*, §§ 496-500.

§ 460. A court which is competent by its own constitution to decide upon its own jurisdiction, and to render judgment without setting out the facts and evidence on which it is based, is a court of general jurisdiction, whose decisions are conclusive, except in an appellate court. A court of special or limited jurisdiction is one which is so constituted that its judgment may be looked through for the facts and evidence to support it, and in such courts every requisite for jurisdiction and its lawful exercise must appear on the face of the proceedings. *Ibid.*

§ 461. In a suit upon a foreign judgment, though ordinarily the jurisdiction of the foreign court may be inquired into, and the validity of the service of process examined, yet if it appear that this question was expressly raised and finally decided in the foreign court, the parties are bound by such decision on the principle of *res adjudicata*. *Moch v. Insurance Co.*, §§ 501-507.

§ 462. The inferior court of common pleas of New Jersey having general jurisdiction in cases of treason was not technically an inferior court, and its judgment confiscating lands, though evidently erroneous, is binding until reversed. *Kempe v. Kennedy*, §§ 508, 509.

§ 463. A decree of the orphans' court in Pennsylvania confirming a guardian's accounts is conclusive, and a bar to a bill in equity asking an account in any other court. *Blount v. Darrach*, §§ 510-513.

§ 464. When a court obtains jurisdiction over specific property of a non resident defendant by publication, its jurisdiction is limited to that property, and a grant of execution to be levied upon other property of defendant, or a sheriff's sale of other property under such execution, is an absolutely void act. *Boswell v. Otis*, §§ 514, 515.

§ 465. A judgment rendered against a party without giving him an opportunity to be heard is wholly void. *Windsor v. McVeigh*, §§ 516-519.

§ 466. A notice to appear implies the right so to do, and a denial of the latter renders the notice ineffectual. *Ibid.*

§ 467. Jurisdiction is the power to hear and determine, not to determine without hearing; and the jurisdiction acquired by seizure in proceedings *in rem* does not give the right to condemn without further proceedings. *Ibid.*

[NOTES.— See §§ 520-567.]

HARVEY v. TYLER.

(2 Wallace, 328-349. 1864.)

STATEMENT OF FACTS.—Tyler brought ejectment against Harvey in the district court for the western district of Virginia, to recover one hundred thousand acres of land formerly included within Kanawha county, but now partly in the newly created Mason county. The defense was that the title was forfeited for non-payment of taxes and had vested in accordance with a Virginia statute in the trustees of the literary fund. Plaintiff claimed that the forfeiture was relieved by certain orders of the Kanawha county court, exonerating the land, by virtue of a power conferred upon it by a certain statute. Plaintiff had judgment in the court below.

Opinion by MR. JUSTICE MILLER.

This case has been twice argued before this court. It involves the title to a hundred thousand acres of land. The oral argument has been able on both sides; but the manner in which the record brings the case before us is one which we have repeatedly condemned, and which has sometimes precluded us from the consideration of points relied on by counsel as error.

§ 468. *Exceptions to the instructions of the presiding judge must be made specifically.*

It is a fair inference from the bill of exceptions that each of the three series of instructions refused was prayed and excepted to as a whole. If so, the proceeding was not only a clear violation of a rule of this court, but if any proposition in the series ought to have been rejected, then the court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked separately, ought to have been given. The exception is a general one to the refusing the prayer of the plaintiffs in error, and to the granting the prayer of the defendants in error. *Rogers v. The Marshal*, 1 Wall., 644; *Johnston v. Jones*, 1 Black, 210; Rule 38 of the Rules of this Court.

However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception. This opportunity is not given when pages of instructions are asked in one prayer, and if refused as a whole, are excepted to as a whole. We may rightfully expect of counsel who prepare cases for this court, that they shall pay some attention to the rules which we have framed for their guidance in that preparation; as well as to those principles of law referred to, which are necessary to prevent the prayer that counsel has a right to make to the court for laying down the law to the jury, from being used as a snare to the court, and an instrument for perverting justice. These observations, which are of daily application in this court, are fully justified by a record which shows forty-six propositions asked of a court at once, as a charge to a jury.

In the present case, while we are relieved from the necessity of examining the forty-three propositions asked by plaintiffs in error (three of the forty-six were granted), we are also relieved from any apprehension that this will work injustice; because the only three propositions asked and granted on the part of defendants in error, and to which by a little liberality we are able to hold the exceptions sufficient, involve all the questions of law which are entitled to consideration, if not all which were argued in the case.

One branch of the controversy — the one of engrossing importance — turns upon the validity of the orders made by the county court of Kanawha county. The court below instructed the jury that these orders “did exonerate the taxes delinquent on the land in controversy for the year 1831, and all years prior thereto,” and it is the soundness of this instruction which we are first to consider.

The plaintiffs in error contend that these orders are void, and therefore nullities, because the records of them do not show that several matters were proven which are essential to the right of the party to have his lands thus exonerated. Ten or twelve of these omissions are urged as applicable to one or the other, or both, these orders; some of which are founded in misconception of what the record contains; some on the absence of averments merely negative, such as the failure to allege that the land had not been vested in the trustees of the literary fund; and all of them, except one or two which will be noticed hereafter, concern matters which may well be supposed to have been substantiated by proof before the court, if we are at liberty to make any presumptions in favor of the validity of the orders of the court.

This brings us to the issue of law in the case. The plaintiffs in error maintain: 1. That the county court which made these orders is a court of inferior and special jurisdiction, and therefore every fact essential to authorize it to make such orders must appear upon the record which the court makes of the transaction; or, 2. If the court is not held to be of this inferior and special character, that the statute confers upon it in this class of cases only such special jurisdiction, and that its orders are subject to the same rule in testing their validity.

It is certainly true that there is a class of tribunals, exercising to some extent judicial functions, of which it may be said, in the language of Chief Justice Marshall, that they are "courts of a special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction." *Kempe v. Kennedy*, 5 Cranch, 173 (§§ 508, 509, *infra*).

§ 468a. *County courts of Virginia are courts of general jurisdiction.*

The first inquiry, then, on this subject, must be into the character of the county court of Kanawha county, which rendered these judgments of exoneration. The powers of these courts in Virginia were originally conferred and prescribed by the act of 1792, and are to be found fully stated in section 7 of the act of 1819. 1 Revised Code, 246. "The justices of every such court, or any four of them as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority and jurisdiction to hear and determine all cases whatsoever now pending, or which shall hereafter be brought in any of said courts, at common law or in chancery, within their respective counties and corporations, and all such other matters as by any particular statute is or shall be made cognizable therein." Section 8 provides that said courts shall be holden four times per year for the trial "of all presentments, criminal prosecutions, suits at common law, and in chancery, where the sum or value in controversy exceeds \$20, or four hundred pounds of tobacco."

It is impossible to come to any other conclusion from this statute than that the county courts of Virginia were courts of general jurisdiction, and were inferior only in the sense that their judgments might be revised by some appellate tribunal. They were in no sense courts of special jurisdiction, and were unlike county courts in other states — Kentucky, for example, in reference to which a Kentucky decision has been quoted to us — which had no common law or chancery jurisdiction, whose principal functions were ministerial, in reference to the roads, bridges and finances of the county, to which are sometimes added those judicial functions which relate to wills and the administration of the estates of decedents. These all differ widely from the county courts of Virginia, which have all those powers of general jurisdiction usually found in circuit courts, courts of common pleas, courts of chancery and others of similar character.

§ 469. *In courts of general jurisdiction every presumption not inconsistent with the record is indulged in favor of jurisdiction.*

In reference to all these the general rule is that every presumption not inconsistent with the record is to be indulged in favor of their jurisdiction; and their judgments, however erroneous, cannot be questioned when introduced collaterally, unless it be shown affirmatively that they had no jurisdiction of the case. *Kempe's Lessee v. Kennedy*, 5 Cranch, 173 (§§ 508, 509, *infra*); *Voorhees v. Bank of United States*, 10 Pet., 449; *Ex parte Watkins*, 3 Pet., 193; *Grignon v. Astor*, 2 How., 319 (§§ 496–500, *infra*).

§ 470. *Difference between special and general jurisdiction.*

In regard to the second proposition, it is not so easy to determine in all cases the principle which is to govern. The jurisdiction which is now exercised by the common law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law, but often in derogation of that law.

In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times. There is, however, one principle underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. It is, that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceeding for that purpose. The only difficulty in applying the rule is to ascertain the question of jurisdiction. Former adjudications of this court have done much to throw light upon this difficult point, and to settle the rules by which it may be determined. We will notice a few of the most important.

One of the earliest is the case of *Kempe v. Kennedy*, 5 Cranch, 173 (§§ 508, 509, *infra*). Certain acts of the legislature of New Jersey confiscated the property of those who had sided with Great Britain in the war of the Revolution. They conferred the power of ascertaining that fact by inquest instead of by regular indictment, in the inferior court of common pleas of each county. In an action of ejectment, brought in the circuit court of the United States by Grace Kempe, the defendants set up a title acquired under proceedings thus authorized. In this court, on error, it was argued that, as to these proceedings, the court must be considered as one of special and limited jurisdiction. But the court, by Chief Justice Marshall, said: "This act" (the statute of New Jersey) "cannot, it is conceived, be fairly construed to convert the court of common pleas into a court of limited jurisdiction in cases of treason." "In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and if an offense punishable by the law had been in fact committed, the accused was amenable to its jurisdiction, so far as respects her property in New Jersey. The question whether this offense was or was not committed, that is, whether the inquest which was substituted for a verdict on an indictment did or did not show that the offense had been committed, was a question which the court was competent to decide. The judgment was erroneous, but it was a judgment, and until reversed cannot be disregarded."

In the case of *Voorhees v. The Bank of the United States*, 10 Pet., 449, the

validity of certain proceedings in attachment were called in question, on the ground that the record of the court of common pleas, in Ohio, in which the proceedings were had, did not show certain steps which the law required. The defendant in the attachment proceedings was a non-resident; yet his land had been levied on, condemned and sold, without an affidavit, without notice by publication, without calling him three times, at three different terms of the court, and without waiting twelve months from the return of the writ, before the sale; all of which are specially required in the act regulating the proceedings. Here was a case of special and stringent proceedings *in rem*, in the absence of jurisdiction over the person, where material provisions of the law, for the protection of defendant's rights, were omitted, so far as the record showed. "It is contended," said this court, "by the counsel for plaintiffs in error, that all the requisitions of the law are conditions precedent, which must not only be performed before the power of the court to order a sale, or of the auditors to execute it, can arise, but such performance must appear in the record." This is precisely what is contended for in the case now before us, and the circumstances of this case and of that are remarkably similar in their relation to the principles which we are now discussing. The court said, in reply to this: "The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear upon the record." "We do not think it necessary to examine the record in the attachment suit, for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy are narrowed to the single question, whether this omission invalidates the sale. The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction, to which was added, by the act of 1805, the power to issue writs of attachment, and order a sale of the property attached, on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached." "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." "If the defendant's objection can be sustained, it will be on the ground that this judgment is false, and that the order of sale was not executed according to law, because the evidence of its execution is not in the record. The same reason would equally apply to the non-residence of the defendant within the state, the existence of the debt due the plaintiff or any other creditor, which is the basis of the whole proceedings."

In the case of *Thompson v. Tolmie*, 2 Pet., 157 (§§ 475-479, *infra*), a sale of real estate by three orphans of this city was assailed in this court on similar grounds. The court says: "Those proceedings were brought before the court collaterally, and are by no means open to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervisory power of the court to receiving its final ratification. The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only." "If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question." Both these latter cases are cited, reaffirmed and the doctrine amplified in *Grignon v. Astor*, 2 How., 319 (§§ 496-500, *infra*).

§ 471. *Application of foregoing principles.*

The application of these principles to the case before us will be very obvious upon a slight examination of sections 21 and 22 of the act of 1831, which confers on the county courts the power to exonerate lands from delinquent taxes. We have already seen that they are courts of general jurisdiction. These sections authorize them, when certain facts are proved by the owner of the land, "to render judgment in favor of such person exonerating the land;" "but no judgment shall be rendered except in the presence of the attorney for the commonwealth, or some other attorney appointed by the court to defend the interest of the commonwealth. If the application shall fail, judgment shall be rendered against the applicant, and he shall be adjudged to pay costs." Now here are all the usual accompaniments of a judicial proceeding—a court of competent jurisdiction, parties plaintiff and defendant, namely, the applicant and the state; a subject-matter of consideration, to wit, the exoneration of the land from delinquent taxes, and a judgment of the court, either establishing such exoneration or that the claim to it is not a rightful claim, and in either case conclusive of that claim. Care is taken that the commonwealth shall be represented by capable counsel; and the only fact required by the act to appear on the record is the presence of such counsel. That the appearance of this fact on the record is made the only one essential to the validity of the judgment is strong evidence that the other facts on which the judgment of the court may depend need not so appear.

The transcripts of the judgments of exoneration produced in this case show that there were proper parties before the court; that the subject-matter of the exoneration of the land from delinquent taxes was before it, and that it rendered judgments exonerating it from all delinquent taxes. Can it be required to give validity to these judgments that the record shall show that every fact was proved upon which the judgment of the court must be supposed to rest? Such a ruling would overturn every decision made by this court upon that class of cases, from that of *Kempe v. Kennedy*, already referred to, down to the present time.

§ 472. *Statutes are construed to operate prospectively, unless a contrary intent is apparent.*

It is urged that the twenty-second section of the act of 1831 was not intended to confer the right of exoneration as to taxes delinquent after the passage of the act. If this were true, we do not feel sure that, under the principles just considered, it could invalidate the judgment of the court. It would be a mistake as to the law, which would make the judgment erroneous; but would it, therefore, be void? We do not, however, concur in this construction of the act. There is nothing in its language which limits this relief to past delinquency, and it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect. The power of the court over this subject, it is true, is limited in point of duration to three years; but that period extends beyond the time when the taxes for the year 1831 would become delinquent, and would, therefore, seem to embrace them unless expressly excluded. The third section of the act of December 16, 1831, and the second section of the act of March 10, 1832, both recognize and proceed upon this construction of these sections, and remove any doubt which may have existed on that subject.

It was in proof that, at the time these judgments were rendered, a considerable part of this one hundred thousand acre tract lay in other counties which had been created out of the county of Kanawha; and it is said, as to so much of said land, the judgments of the county court of that county were without jurisdiction. The tract had always been listed for taxation as a unit, in the county of Kanawha, for the entire period of thirty-one years or more, to which the *exoneration* extended. The bill of exceptions states that the land was uniformly charged with taxes there, and *not elsewhere*. It was these delinquent lists, returned regularly by the auditor of the state to the county from whence they came, from which the owner desired to be relieved. An application to the court of a county where they did not exist would have been unavailing. It would be sticking in the bark to say that a party entitled to relief could not get it in one county because all the land did not lie there; nor in any other county, because no evidence of such delinquency appeared in the tax-lists of the latter to be exonerated. The land in question was charged with taxes nowhere but in Kanawha county, and in that county it was proper that the *exoneration* should be entered.

It is to be remarked of all these objections to the judgments of exoneration, that the parties who made them show no patent, or other title, from the state of Virginia, and are setting up defects in those judgments of which neither the state of Virginia, which was a party to the proceedings, nor the trustees of the literary fund, who were entitled if they were invalid, have ever complained, or sought to take advantage. On the contrary, the auditor of the state of Virginia, its official accounting officer, recognized these judgments as valid, by making entries in his books to the effect that the taxes were released by them.

We are of opinion, therefore, that the first instruction given at request of plaintiffs was correct. The second was to the effect that if some of the defendants had made entries and surveys of any part of the land in controversy, under which they were setting up claims to it, they were properly sued, although not in occupation of it at the time the suit was instituted.

§ 473. *Ejectment may be maintained in Virginia against party claiming title, although out of possession.*

The code of Virginia, as well as that of several other states, allows the action of ejectment to be brought against persons claiming title or interests in the property, although not in possession. It says (ch. 135, § 2): "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit." If, then, there was a part of the tract claimed by some person, on which there was no occupant, the case existed which the second clause of the section provides for. The policy of this act is obvious. It is that persons out of possession, who set up false claims to land, may, by a suit in ejectment, which is the legal and proper mode of trying title, have that claim brought to this test. The act provides that such a judgment is conclusive against all the parties; and thus the purpose of the law to quiet title by a verdict and judgment in such cases is rendered effectual. The language of the code of New York is identical with that of Virginia on this subject. And the construction we have given to it was held to be the true one by the supreme court of the former state. *Banyer v. Empie*, 5 Hill, 48.

§ 474. *Possession by one not claiming title is not adverse.*

The third and last instruction given at the instance of plaintiffs had reference to the question of adverse possession in its relation to the statute of limitations. Its purport was that if plaintiffs' title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, *without title, or claim or color of title*, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto. We think this law to be too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the government or in some one deriving title from the government, state or national. Any one in possession, with no claim to the land whatever, must, in presumption of law, be in possession in amity with and in subservience to that title. Where there is no claim of right the possession cannot be adverse to the true title. Such is the rule given as recently as 1854, by the court of appeals of Virginia, in the case of *Kincheloe v. Tracewells*, 11 Gratt., 605. The court there says: "An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster, and gain possession to the parties entering, must be accompanied by a claim of title." *Society, etc., v. Town of Pawlet*, 4 Pet., 504; *Ewing v. Burnet*, 11 id., 52; *Angell on Limitations*, §§ 384, 390.

We have thus examined the points made by the exceptions to the instructions asked by plaintiffs, and given by the court. If there are points made on the instructions prayed by defendants, and refused by the court, not embraced in those we have discussed, they are of minor importance, and do not affect the merits of the case.

Judgment affirmed.

THOMPSON v. TOLMIE.

(2 Peters, 157-169. 1829.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This was an action of ejectment brought in the circuit court of the District of Columbia, in the county of Washington, to recover possession of lot No. 14, in square No. 290, in the city of Washington. Upon the trial the lessors of the plaintiff produced, and proved, by sundry mesne conveyances, a title to the premises in question, from David Burnes, one of the original proprietors of city property, to Robert Tolmie, who, in the year 1805, died intestate. And it was also proved that the lessors of the plaintiff are the heirs at law of Robert Tolmie. The defendant claimed title to the premises in question, under a purchase made at a commissioner's sale, by virtue of certain proceedings had in the circuit court, pursuant to the provisions of the laws of Maryland relative to a division of the real estate of intestates in certain cases. Objections were made to the validity of these proceedings, and a verdict taken for the plaintiff, subject to the opinion of the court upon a case agreed. The court below decided that the commissioner's sale was void, and rendered judgment for the plaintiff for two-thirds of the premises in question, and the case comes now before this court upon a writ of error.

The case in the circuit court turned entirely upon questions arising upon the proceedings under which the sale was made. It was assumed on the argument, by the counsel on both sides, that the circuit court in which these proceedings were had was vested with the same powers in this respect, in relation to intestates' estates in the county of Washington, that is possessed by a county court in Maryland on this subject, over lands lying within the county.

The exceptions taken to the proceedings were: 1. Because none of the heirs of Robert Tolmie were of age at the time of the sale. 2. Because the sale was never ratified by the court. 3. Because bonds for the purchase money were not taken, payable to each representative, according to his proportional part of the net amount of the sale. 4. Because the deed does not recite the commission and all the necessary proceedings thereon, to show a good title.

§ 475. *Where proceedings in another court are collaterally drawn in question, they can be rejected as void only when there was a total want of jurisdiction in the court.*

The counsel for the defendant in error have, in the argument, considered these proceedings open to the same examination and objections as they would be in an appellate court, on a direct proceeding to bring them under review. This, however, is not the light in which we view the questions now before us. These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question.

§ 476. *Law of Maryland as to division of an intestate's estate.*

The first inquiry therefore is, whether it sufficiently appears upon the face of these proceedings that the court had jurisdiction of the subject-matter. The law of Maryland under which they took place (Act of 1786, ch. 45, head 8) declares that in case the parties entitled to the intestate's estate cannot agree upon the division, or in case any person entitled to any part be a minor, application may be made to the court of the county where the estate lies, and the court shall appoint and issue a commission to five discreet men, who are required to adjudge and determine whether the estate will admit of being divided without injury and loss to all the parties entitled, and to ascertain the value of the estate. And if the estate can be divided without loss or injury to the parties, the commissioners are required to make partition of the same. And if they shall determine that the estate cannot be divided without loss, they shall make return to the county court of their judgment and the reasons upon which the same is formed, and also the real value of the estate. And if the judgment of the commissioners shall be confirmed by the county court, then the eldest son, child, or persons entitled, if of age, shall have the election to take the whole of the estate, and pay to the others their just proportion of the value in money; and on the refusal of the eldest child, the same election is given in succession to the other children, or persons entitled, who are of age; and if all refuse, the estate is to be sold under the direction of the commissioners, and the purchase money divided among the several persons entitled, according to their respective titles to the estate. But if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold until the eldest arrives to age, and the profits of the estate shall be equally divided in the mean time.

§ 477. *Where a jurisdictional fact appears on the record, its falsity is immaterial when the proceedings are collaterally called in question.*

The principal objection raised to the title of the defendant below, and indeed the only one that presents any difficulty, is that upon the trial of this cause it was proved that none of the heirs of Robert Tolmie had arrived at age when the sale was made; and how far this will affect the sale will depend upon the question, whether the proceedings on the partition, when brought up in this collateral way, were open to an inquiry into that fact. Did the jurisdiction of the court over the subject-matter of the proceedings depend upon that fact; or, if true, was it matter of error, and to be corrected only on appeal?

It is to be borne in mind that no such fact appears on the face of these proceedings, but on the contrary, from what is stated, it may reasonably be inferred that it appeared before the court that one of the heirs was of age. The petition presented to the court for the appointment of commissioners, and which was the commencement of the proceedings, in setting out the parties interested states that Robert Tolmie died intestate, leaving the following children and heirs at law, namely, Margaret, since intermarried with Francis Beveridge, and Alice Tolmie and James Tolmie, which said Alice and James are infants under the age of twenty-one years. Why specially allege that these two were minors if Margaret was also a minor? Every reasonable intendment is to be made in favor of the proceedings, and their allegation in the petition will fairly admit of the conclusion that the petitioners intended to assert that Alice and James only were under age. The age of the heirs was, at all events, a matter of fact upon which the court was to judge; and the law nowhere requires the court to enter on record the evidence upon which they decided that fact. And how can we now say but that the court had satisfactory evidence before it that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the court depended upon that fact, it is by no means clear that it would be permitted to contradict it on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question in this collateral way is certainly not warranted by any principle of law.

§ 478. *Under the statute of Maryland of 1799, providing for division of an intestate's estate, the jurisdiction of the court did not depend upon the majority of one of the heirs, but upon the minority of one or more.*

But, independent of these considerations, the jurisdiction of the court over the subject-matter of the proceedings sufficiently appears. It did not depend on the fact that one of the heirs was of age. But, according to the express terms of the act, it attaches when the ancestor dies intestate, and any of the persons entitled to his estate is a minor. The petition states that Robert Tolmie, late of the county of Washington, died intestate, seized in fee of lot No. 14, in square No. 290, leaving Alice Tolmie and James Tolmie, two of his children and heirs at law, under the age of one and twenty years. And whether Margaret Beveridge, his other child and heir, was of age or not, was immaterial as it respected the jurisdiction of the court. That fact could only become material in case the land was not susceptible of a division without injury or loss to the parties. If it could be divided without injury, the commissioners were required to divide it, although all the heirs were minors. The materiality of the inquiry whether any one of the heirs was of age was altogether contingent, and might never arise. And at all events must depend upon the report of the commissioners, whether or not the property might be divided

without injury. This must necessarily, therefore, be an inquiry arising in the course of the proceedings, and after the jurisdiction of the court attached.

With respect to the other exceptions, it would be difficult to sustain them if the proceedings were before this court on a direct appeal. No more could be required than to set forth enough to show the jurisdiction of the court and a substantial compliance with the requirements of the law. In June term, 1814, the court confirmed the report of the commissioners, that the property would not admit of a division, and ordered a sale thereof, prescribing the terms, namely, one-fourth cash and the other three-fourths on a credit of three, six and nine months, taking bonds with good security to the heirs according to their several rights, bearing interest from the day of sale. On the 15th of June, 1815, after the expiration of the time of credit ordered by the court to be given, the commissioners report a sale of the lot to the defendant below, for \$1,105, and that the purchase money and interest had all been paid, and they request that the sale may be ratified, and they directed to distribute the money and make a conveyance to the purchaser. It is objected that it does not appear that bonds were given to the heirs according to the order of the court and the directions of the act of 1799. But this objection cannot certainly be considered of any importance after the money had been paid by the purchaser, and the report ratified and confirmed by the court, and the commissioners directed to make a deed to the purchaser. But it is said this was a conditional ratification, and not to take effect until receipts from the parties entitled to the money were produced to one of the judges of the court. Suppose this is to be considered a conditional ratification, and the purchaser not entitled to a deed until the condition was performed. Where is the evidence that affords any inference that it was not performed? The receipts were to be produced to one of the judges of the court, and was not a matter which the court were afterwards to sanction or to pass any order upon. It was not a judicial act, and would not of course be made matter of record. And the deed being afterwards given, affords a pretty fair inference that the order of the court had been complied with.

The last objection is that the deed does not recite the commission and all the necessary proceedings thereon, to show a good title. The act of 1799, in directing the commissioners when to give deeds to purchasers, has the general provision that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended that the commission and all the proceedings should be set out *in hæc verba*, and the substance of them is recited, which is all that could be necessary, so that this exception is not well taken as to the matter of fact.

From this brief notice of the several objections which have been taken to these proceedings, it will be seen that, in the opinion of this court, the last three are unfounded, and could not be sustained even on a direct appeal; and the first, although entitled to more consideration, cannot at all events be raised when the proceedings are collaterally drawn in question, as they were on the trial of this cause.

§ 479. *Early authorities reviewed.*

The Maryland cases cited in the argument and reported by Harris and Johnson, volume 5, 42, 130, and volume 6, 156, 258, do not throw much light upon the particular questions drawn under examination in this case. Some of them, however, are very strong cases to show how far the courts of that state will go to sustain *bona fide* titles acquired under sales made by virtue of these

statutes. The rules which apply to and govern titles acquired under sales made by order of orphans' courts and courts of probate in the states where such regulations are adopted, are applicable to the case now before the court. The case of *M'Pherson v. Cunliff*, 11 Serg. & R., 429, was one of this description, and brought under the consideration of the supreme court of Pennsylvania the effect of a decree of the orphans' court, in matters within its jurisdiction, although founded in a mistake of facts. And in the discussion of that question, which is gone into very much at large, rules are laid down which have a strong bearing upon the present case. When there is a fair sale, say the court, and the decree executed by a conveyance from the administrator, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. After a lapse of years presumptions must be made in favor of what does not appear. If the purchaser was responsible for the mistakes of the court in point of fact, after they had adjudicated upon the facts and acted upon them, these sales would be snares for honest men. The purchaser is not bound to look further back than the order of the court. He is not to see whether the court was mistaken in the facts of debts and children. That the decree of an orphans' court, in a case within its jurisdiction, is reversible only on appeal, and not collaterally in another suit.

In *Perkins v. Fairfield*, 11 Mass., 227, in the supreme judicial court of Massachusetts, it was held that a title under a sale by administration, by virtue of a license from the court of common pleas, was good against the heirs of the intestate, although the license was granted upon a certificate of the judge of probates, not authorized by the circumstances of the case. The court said the license was granted by a court having jurisdiction of the subject. If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence from the probate court, yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction. The case of *Elliott v. Peirsol*, 1 Pet., 340, decided in this court at the last term, has been referred to by the counsel for the defendant in error, as containing a doctrine that will let in every possible objection that can be made to these proceedings.

The observation relied upon is: "But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned when its proceedings were brought collaterally before the circuit court." This remark was only in answer to the argument which had been urged at the bar, that the circuit court could not question the jurisdiction of the county court. That it was so intended is obvious from what immediately follows: "We know nothing in the organization of the circuit courts of the Union which can contradistinguish them from other courts in this respect." And the limitation upon the extent of the inquiry, when the proceedings are brought collaterally before the court, is explicitly laid down. "We agree that if the county court had jurisdiction, its decisions would be conclusive. When a court has jurisdiction, it has a right to decide every question that occurs in the cause, and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought in opposition to them, even prior to a reversal."

This is the clear and well settled doctrine of the law, and applies to the case

now before the court. The jurisdiction of the court (under whose order the sale was made) over the subject-matter appears upon the face of the proceedings, and its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally, as they were in the circuit court.

The judgment of the court below must, accordingly, be reversed, and the record sent back with directions to the court to enter judgment for the defendant.

GRAY v. LARRIMORE.

(Circuit Court for California: 2 Abbott, 542-559. 1865.)

Opinion by FIELD, J.

STATEMENT OF FACTS.— This is an action to recover the possession of certain real property situated within the city of San Francisco, and the rents and profits of the same, withheld from the plaintiffs. It is tried by the court without the intervention of a jury, pursuant to a stipulation of the parties, under a recent act of congress. Both parties claim title from the same source — from Franklin C. Gray, deceased, who died intestate in July, 1853, possessed of a large property, real and personal. Of the real property, the premises in controversy are a portion. The deceased left surviving him a widow, Matilda C. Gray, and a posthumous child, Franklina C. Gray, and, by the statute of descents and distributions of California, they inherited his entire estate in equal shares.

The defendants claim title to the premises by virtue of a sale and deed, made under a decree rendered in an action in the district court of the state, to which the widow and child are alleged to have been parties. It is upon the validity of this decree, and consequent sale and deed, that the case must turn. The action in which the decree was rendered arose in this wise: In February, 1854, William H. Gray, a brother of the deceased, instituted a suit in equity, in the district court of the state, against Joseph C. Palmer and Cornelius J. Eaton, who had been appointed administrators of the estate of Franklin C. Gray, and against the widow, Matilda, and one James Gray. Subsequently the child Franklina was made a party defendant. In his bill the complainant alleged that a copartnership had existed between him and his brother since 1848, and that it embraced all their business and all their purchases of real property, although the titles were taken in the individual name of the deceased. The partnership stated was both universal and dormant, the interest of the complainant extending to one-third of all acquisitions of every kind and description of both copartners. The object of the bill was to settle up the affairs of the alleged copartnership and obtain a decree for the one-third claimed by the complainant.

In January, 1855, Cornelius J. Eaton, who had been a clerk of the deceased, who, as administrator, was made a defendant in the above action of Gray, resigned his trust, and instituted a suit in equity in the district court of the state against Palmer, the remaining administrator, and against the widow and child. In his bill he also alleged that a copartnership had existed between himself and the deceased; that it commenced in January, 1851, and embraced all the property, real and personal, of both, and all their business, and that his interest extended to one-fourth of the property possessed at the time, and all future acquisitions. The object of the suit was to settle up the affairs of the alleged

copartnership, and to obtain a decree adjudging to the complainant the one-fourth part of the estate claimed.

The amendment to the bill in the suit brought by Gray, by which the child Franklina was made a party, alleged that she was absent from the state and resided with her mother at Brooklyn, in the state of New York. The bill filed by Eaton averred that the child was not a resident or a citizen of California, but was a resident and citizen of the state of New York or of the District of Columbia. Service of summons upon her was, therefore, attempted by publication in both cases. When, as was supposed, the service had been in this way effected, a guardian *ad litem* for the child was appointed by the court in both cases. The appointment was made in each case upon the petition of the complainant. The other defendants appeared by attorneys and answered.

On October 23, 1855, upon the stipulation of the guardian and the attorneys of the other defendants, the two actions were consolidated into one. Four days subsequently a decree was entered in this consolidated action, and it would seem from the certificate of the judge of the court appended to the decree, that it was entered without trial, upon the consent and agreement of the parties. By this decree it was adjudged that a partnership had existed between Eaton and the deceased, which embraced all the property, real and personal, and all the business of both, and that in this partnership Eaton had an interest of one-fourth; that a similar copartnership had also existed at the same time between Gray and the deceased, in which Gray had an interest of one-third; that the latter copartnership was subject to the copartnership of Eaton; and that, therefore, Eaton should first take one-fourth of the estate, and Gray one-third of the remaining three-fourths, and that the other two-fourths should be equally divided between the widow and child. By the decree a reference was also ordered to a commissioner, to take and state an account of the business, profits and property of the two copartnerships, with directions, upon the confirmation of his report, to sell all the property of both, and upon the confirmation of the sales to execute proper conveyances to the purchasers.

Upon the statement of the accounts by the commissioner, the deceased was found largely indebted to each of his alleged copartners. Although Gray had been interested, as pretended, in one-third of the property and profits of a universal copartnership with his brother for nearly five years, and had been oftentimes pecuniarily embarrassed in transactions with other parties, and on one occasion, as late as March, 1853, had even borrowed money of his brother, on interest at the rate of three per cent. a month, he had been careful to preserve untouched his proportion of the large sums and property accumulated by the alleged copartnership, and therefore had refrained from drawing any moneys from the concern. The deceased, in the mean time, as counsel very pointedly observe, had spent the money of the alleged firm as freely as though it had been his own. Like prudential considerations appear to have governed, except in one instance, the conduct of the alleged partner Eaton during the period of two years and a half. It very naturally turned out, under these circumstances, upon the accounting, that the indebtedness of the deceased to both copartners for the excess over his share, drawn by him from the concern, was large. It was found to be so large that it absorbed the entire portion of the estate which would otherwise have gone to the widow and child. Out of property inventoried in the probate court of San Francisco at \$237,000, there was nothing left for them; indeed, the estate of the deceased was brought in debt to these alleged universal copartners over \$3,500.

By a decree of the court, bearing date on April 7, 1856, the report of the commissioner was confirmed, and a sale of the entire property, real and personal, of the alleged copartnerships was ordered. Objection was taken to the admissibility of this decree, to which we may hereafter refer. But we shall treat the decree as properly in the case. The sale which it directs was made on May 3, 1856. At that sale the defendant Larrimore became the purchaser of the property in controversy, and subsequently received a deed from the commissioner, and went into possession, and has continued in the possession and use of the premises ever since. The other defendants hold under him.

On appeal to the supreme court of the state, the decree of the district court in the consolidated action was reversed, and it was held that the evidence presented did not warrant the conclusion that a copartnership had existed between William H. Gray and the deceased. The case was accordingly remanded to the district court, and afterwards both suits were dismissed. The plaintiffs then brought the present action of ejectment. The defendants rely, as we have already stated, upon the validity of the decree, in the consolidated action, for the sale of the premises, notwithstanding its subsequent reversal.

On the other hand, the plaintiffs insist that the district court never acquired jurisdiction of the person of the child Franklina by service of summons or by her appearance; and that, in her absence as a party to the proceedings, no valid decree for the sale of the alleged partnership property could pass; in other words, that she was an indispensable party to the ascertainment of the debts, and the settlement of the accounts of the alleged copartnerships and the sale of the property belonging to them. The questions presented, then, are: Was she brought before the court by service of process, or did she otherwise appear in the suits? And if she neither was served nor appeared, was it competent for the court to proceed with the suits in her absence?

§ 480. *The jurisdiction of any court may be inquired into when any benefit is claimed under its proceedings. Presumptions as to jurisdiction.*

It is a familiar doctrine that the jurisdiction of any court over either the person of the defendant or the subject-matter may be inquired into whenever any right or benefit is claimed under its proceedings. The want of jurisdiction will render its judgments and decrees unavailable for any purpose. *Borden v. Fitch*, 15 Johns., 140; *Williamson v. Berry*, 8 How., 541. The doctrine is as applicable to the proceedings of courts of superior or general authority as it is to courts of inferior or limited authority. The difference between these courts in this respect relates only to the presumptions raised by the law. With reference to courts of superior or general authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings. *Mills v. Martin*, 19 Johns., 33; *Bloom v. Burdick*, 1 Hill, 140.

The general presumption indulged in support of the judgments and decrees of the superior courts is, however, limited to jurisdiction over persons within their territorial limits — persons who can be reached by their process — and also over proceedings which are in accordance with the course of the common law. Whenever it appears, either from inspection of the record or by evidence outside the record, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit or protection of its judgments and

decrees. So, too, the presumption ceases when the proceedings are not in accordance with the course of the common law. With reference to such proceedings, the superior courts, though in other respects possessing general authority, exercise only a limited and special jurisdiction.

§ 481. *A statute authorizing service by publication is in derogation of the common law, and its provisions must be strictly complied with.*

In the bills of complaint in the two actions of Gray and Eaton, the absence of the infant Franklina from California and her residence in another state are alleged. The presumption of jurisdiction over her person by the district court is thereby repelled, and it remains for the defendants to show that, by means provided by the statute in such cases, the jurisdiction was acquired. The statute substitutes, in case of a non-resident and absent defendant, constructive service by publication of the summons, in place of personal service; and it designates the facts which must appear to authorize an order for the publication, the period for which the publication must be made, and the manner in which such publication must be proved. The statute is in derogation of the common law, and its provisions must be strictly pursued. A failure to comply with any of the particulars stated will be fatal unless cured by the voluntary appearance of the party.

§ 482. *Service by publication under the statute of California held defective.*

In the first place, to obtain the order it must appear, by affidavit, to the satisfaction of the court or the judge, that the defendant is at the time a non-resident or absent from the state, and that the plaintiff has a cause of action against him, or a cause of action for the complete determination of which he is a necessary or proper party. Until these facts appear—not by the complaint, but by affidavit—no order can be legally issued. “In granting the order,” says the supreme court of the state in a recent case, “the court or judge acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant. There is no other way of bringing the fact of residence to the judicial knowledge of the court or judge.” *Ricketson v. Richardson*, 26 Cal., 149; Pract. Act, § 30. In the second place, the order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the defendant, and the publication must not be less than three months. If the residence of the non-resident or absent defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the postoffice, addressed to him at his place of residence. Pract. Act, § 31. And in the third place, proof of such service must be made “by the affidavit of the printer or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited.” Pract. Act, § 32.

Tested by these provisions of law, the proceedings to secure service by publication and the proof of publication were defective in essential particulars: 1. There was no affidavit presented to the court in either case, when the order was obtained. The action of the court, so far as the record discloses, may have been taken in each case upon the verbal statement of the plaintiff or of his counsel. 2. In the case of *Eaton v. Palmer*, there was no affidavit or other proof of publication; and in *Gray v. Eaton* the affidavit did not show that the affiant was either “the printer or his foreman or principal clerk.” It merely described himself as being the clerk; it did not state such to be the fact. This description was not a compliance with the requirements of the statute. The

authorities are uniform on this point. In the recent case of *Steinbach v. Leese*, 27 Cal., 295, in the supreme court of the state, the precise question was considered and determined. There the affiant described himself as principal clerk in the office of the newspaper in which the publication was made, but did not aver that such was his position in fact, and the court held that the affidavit was fatally defective; that by the statute the only persons competent to testify as to the publication are the "printer or his foreman or principal clerk;" and that the affiant is one of them is of itself a substantive fact, which must be proved as such, before the court can proceed to render judgment. *Staples v. Fairchild*, 3 N. Y. (3 Comst.), 43; *Payne v. Young*, 8 N. Y. (4 Seld.), 158.

There was an attempt made to supply the omission of the affidavit, by evidence at the trial that the affiant was in fact the principal clerk of the printer; but such evidence was clearly inadmissible. The statute prescribes the character of the evidence which shall be produced, and by whom it shall be given. It is not sufficient that other proof equally persuasive and convincing may be offered. The statutory proof will alone suffice. If the omission could be remedied at all at this late day, which is very questionable, it could only be done by the direct action of the court to which the record belongs. It is not competent for this court to receive parol testimony to supply the omission. *Noyes v. Butler*, 6 Barb., 617; *Lowry v. Cady*, 4 Vt., 506.

The defects stated are decisive upon the question whether the district court ever acquired jurisdiction over the person of the infant Franklina. As to her, the alleged record of that court is no record. The position urged by counsel, that the mother, as the natural guardian of the infant, had the right to appear for her without service on her, does not require consideration, for no such appearance was made or attempted. The guardian *ad litem* for the infant was appointed upon the application of the plaintiff in each case. But were it otherwise, the result would be the same. There can be no appearance of the infant until a guardian *ad litem* is appointed, and no such appointment can be made until service on the infant is effected. *Gray v. Palmer*, 9 Cal., 628. The appearance of the mother on her own behalf, or any request by her attorney for the appointment of a guardian, could not dispense with the service.

§ 483. *In a suit to settle the affairs of a copartnership, the presence of all the partners, or their personal representatives, is essential to the jurisdiction.*

The infant not having been brought into court, the next inquiry is as to the effect of the proceedings and decree upon the interests of the widow Matilda.

The object of the two actions of Gray and Eaton, and of course of the consolidated action, was, as already stated, to settle up the affairs of the alleged copartnerships, and to obtain a distribution of the effects and property of the copartners according to their respective interests. To these actions, the deceased, had he been living, would have been an indispensable party, their aim being to dispose of property the title to which stood in his name, and of which he was apparently the sole owner. Any decree therein distributing or selling the property without his presence would have been a nullity, a confiscation of his rights without his day in court—a simple act of judicial usurpation. The same necessity which would have required the presence of the deceased, had he been living, exacts the presence of those who, upon his death, became clothed with the title and apparent ownership of the property. To reach the property, and give the court authority to interfere with it, and divest the owners of their title by ordering a sale, it was necessary to establish the existence of the alleged copartnerships, and that there were debts owing by them. Both

of these facts were essential to the jurisdiction of the court, and the foundation of the entire proceedings. The establishment of either of them necessarily affected, to the same extent, the interests of both the widow and child. If the copartnerships existed they embraced the property claimed by both; they could not exist with reference to the interest which descended to the widow, and not also exist with reference to the interest which descended to the child. They embraced the whole interest in the property — not an undivided interest. Therefore, no valid determination of the fact of copartnership could be made against the widow which would not be equally valid against the child; and if no valid determination could be made against the child, she not being brought into court, there could be none against the widow. The fact of copartnership being established, its operation upon the copartnership property was incapable of division or abridgment.

The same objections apply to the debts alleged to be owing by the copartnerships. If they were legally established, they become liens, not upon the interest of the widow alone, but upon the entire property. The conclusion which follows from these views is, that the child Franklina was an indispensable party to any valid adjudication of the facts of partnership and debt, and consequently to any binding decree for the sale of the alleged copartnership property.

§ 484. *Rule in equity in case necessary parties are beyond the jurisdiction.*

The doctrine of equity, when some of the parties are out of the jurisdiction of the court, is well stated by Mr. Justice Story, in his Equity Pleadings, sections 81, 82 and 83. After commenting upon the general rule that all persons legally or beneficially interested in the subject-matter of a suit in equity should be made parties, and stating an exception with reference to persons without the jurisdiction, who cannot consequently be reached by the process of the court, the learned justice says: "It is an important qualification engrafted on this particular exception, that persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court. The doctrine ordinarily laid down on this point is that when the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree, or if they have rights wholly distinct from those of the other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being made parties. And under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them or their rights or interests; but the suit, so far at least as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective. In many instances the objection will be fatal to the whole suit."

§ 485. *Necessary parties in partnership cases.*

The case of a bill brought by one partner against several other copartners, one of whom was out of the jurisdiction, praying for an account and dissolution of the copartnership, is given by Story in illustration of this last position, that the objection will sometimes be fatal to the whole suit, for "the absent

partner," says the justice, "would have a distinct and independent interest, and would seem to be an indispensable party, since the decree must affect that interest, and, indeed, would pervade the entire operations of the partnership." The case of *Browne v. Blount*, 2 Russ. & M., 83, is also referred to as illustrating the same position. In that case a judgment creditor of one Blount had sued out a writ of *elegit* upon his judgment, and had filed his bill to reach certain real estates which were vested in trustees upon certain trusts, under which Blount was entitled to the rents and profits during his life. The trustees and certain parties interested under the trusts, and others having a charge upon the trust estate, were made parties, but Blount was abroad, and had been for years previous to the institution of the suit, and was therefore not made a party. The court held that, "Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence." See, in further illustration of the doctrine stated, *Mitford*, Ch. Pl., 31, 32; *Inchequin v. French*, 1 Amb., 33; *Fell v. Brown*, 2 Brown, Ch. Cas., 276; *Beaumont v. Meredith*, 3 Ves. & B., 180; *Evans v. Stokes*, 1 Keen, 38; *Russell v. Clark*, 7 Cranch, 98; *Mallow v. Hinde*, 12 Wheat., 194; *Fuller v. Benjamin*, 23 Me., 255; *Sparr v. Scoville*, 3 Cush., 578.

In *Evans v. Stokes* the bill was filed to have the affairs of a joint stock company — which was a copartnership — wound up and settled under the decree of the court, and accounts of the partnership property taken, and a sale of some portion of the property made by the directors set aside; and it was held that all of the members of the company, however numerous, must be made parties. "It is perfectly obvious," said the master of the rolls, "that a suit where all the accounts of the partnership are to be taken, and the rights of all the parties are to be determined as between themselves and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls and others having omitted to do so, cannot be prosecuted in the absence of any of those parties."

The case of *Fuller v. Benjamin* is equally pointed. In that case four persons had been copartners, two of whom had become insolvent, and were out of the state; the suit was brought by one of the partners against the solvent member. On demurrer, for want of parties, the court said: "In cases of partnership it must be difficult, if not impracticable, to proceed in equity without the presence of all the copartners, or their legal representatives. Each must be expected to have claims, either for services rendered or advances made, without the adjustment of which it will be impossible to ascertain what may be due from or to the joint concern by each; or what just claim any one or more of them may have against any one or more of the others. Until such an ascertainment shall have been made it will be impossible to pass a decree, which shall be founded upon the principles of justice, as to their several rights." And again: "The plaintiff in this would seem to be without remedy, either at law or in equity. In *Story on Equity Pleadings*, sections 82, 83, 152 and 218, it is clearly shown that a court of equity cannot take cognizance of a case in the predicament of the one here exhibited. Although the partners not present are insolvent, yet they are indispensable parties, whose rights might be affected by a decree, and who must be present to be able to afford information as to their own claims in connection with those of the others; and if bankrupts, their assignees should be made parties."

The condition of the alleged copartners, Gray and Eaton, might have been similar to that of the plaintiff in this last case — without relief either at law

or in equity — had there not been a provision in the legislation of the state for securing service by publication upon the non-resident infant. As they did not pursue the course pointed out by the statute, their present position with reference to the subsequent proceedings and the decree rendered is precisely what it would have been if no such statute had existed. The principle upon which the several cases cited proceed is fundamental, and underlies the administration of justice in all courts of equity.

The conclusion which we have reached renders it unnecessary to pass upon the objection taken to the introduction of the decree of April 7, 1856. The decree has never been produced upon any previous trial of the actions brought by the widow and child; it is not embraced in the judgment roll of the consolidated action of Gray and Eaton; it did not form any portion of the record which was presented in that action to the supreme court of the state, or of the record in the recent action of ejectment of Gray against Brignardello before the supreme court of the United States. For nearly nine years the original document, signed by the district judge, has lain unknown in the desk of the commissioner in this city. It appears, also, that subsequently, on May 14, 1856, the decree was amended for some alleged want of conformity to the previous report of the commissioner, and that a new decree was substituted in its place. It may well be doubted whether, under these circumstances, the decree should have been received in evidence; but, as stated, the question of its admissibility is rendered immaterial from the conclusions reached on other grounds.

The tax deeds produced by the defendant Larrimore do not aid the defense. He was in possession of the premises at the time the taxes were levied and the sales by the tax collector were made, and it was his duty to have paid the taxes. *Moss v. Shear* covers his case — 25 Cal., 38. Nor did the assessment roll for the years in which the taxes were unpaid show any valuation of the property. *Hurlburt v. Butenop*, 27 Cal., 50; *Woods v. Freeman*, 1 Wall., 398. As to the rents and profits of the premises since the defendant Larrimore went into possession, there is some conflict in the evidence. Our conclusion is that the premises have been worth to him since May 25, 1856, \$100 a month, and that amount will be found as the monthly rents and profits.

The plaintiffs are entitled to a joint judgment against all the defendants for the possession of the premises in controversy, and the plaintiff Franklina to a several judgment against the defendant Larrimore for one-half of the estimated rents and profits from May 26, 1856, and the plaintiff Matilda to a several judgment against him for the remaining half of the rents and profits, commencing three years before the filing of the complaint in the present action; the rents and profits to be calculated in both cases up to this date. Judgment accordingly.

BARROW *v.* HUNTON.

(9 Otto, 80-85. 1878.)

APPEAL from U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Hunton recovered a judgment against Goodrich and Pilcher in a state court of Louisiana, on January 19, 1874. On the 28th January Goodrich filed a petition to have the judgment set aside, because it was founded on a default, and he had not been served with process; and because he had been discharged as a bankrupt in 1868, after the alleged liability had been (if at all) incurred. On February 3, 1874, Hunton, being a citizen of Mis-

souri, had the cause removed to the circuit court of the United States. On the 14th February a decree was rendered dissolving the injunction which had been provisionally granted by the state court and dismissing Goodrich's bill. His administrator, Barrow (Goodrich having died *pendente lite*), appealed from this decree.

§ 486. *The federal court has no power to set aside a judgment of a state court for irregularity or mistake, though having jurisdiction in some cases of fraud.*

Opinion by MR. JUSTICE BRADLEY.

The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise the circuit courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible.

On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S., 10 (§§ 916-921, *infra*), the case might be within the cognizance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.

§ 487. *In Louisiana a proceeding to annul a judgment affected by irregularity must be taken in the court in which such judgment was rendered.*

It would seem apparent that the proceeding in the present case was one that affected the mere regularity of the original judgment. In the common law practice it would have been a motion to set aside the judgment for irregularity or a writ of error *coram vobis*. It will be more satisfactory, however, to take a brief view of the practice of Louisiana on this subject. The process for procuring nullity of a judgment in that state is prescribed by the code of practice, in which we find the following provisions:

"Article 556. Definitive judgments may be revised, set aside or reversed: 1, by a new trial; 2, by appeal; 3, by action of nullity; 4, by rescission. The last mode can only be exercised by minors or persons who were absent when judgment was rendered against them."

"Article 605. The causes for which the nullity of a definitive judgment may be demanded are twofold: those that are relative to the form of proceeding, and those that appertain to the merits of the question to be tried."

Article 606 specifies the vices of form for which a judgment can be annulled; as, when against a minor appearing without a curator, or against a married woman appearing without the authority of her husband; where the defendant is condemned by default without being cited; where the judge was incompe-

tent to try the suit; and where defendant has not been legally cited, and has not entered appearance, and judgment is by default. Article 607 specifies the grounds of nullity relating to the merits; namely, where the judgment has been obtained through fraud, bribery, forgery of documents, etc.

"Article 608. The nullity of judgment may be demanded from the same court which has rendered the same, or from the court of appeal before which the appeal from such judgment was taken, pursuant to the provisions hereafter expressed.

"Article 609. The nullity can be demanded on the appeal, only while the appeal is still pending, and when the nullity is apparent on the face of the records.

"Article 610. The party praying for the nullity of a judgment before the court which has rendered the same must bring his action by means of a petition; and the adverse party must be cited to appear, as in ordinary suits."

From these extracts it is to be inferred that the action of nullity must be brought in the same court which rendered the judgment, or in the court of appeal when an appeal is pending. And so the supreme court of Louisiana has decided. Hennen's Digest, art. Judgment, XI. (c), and cases there cited. In *David v. Calouret*, 1 La. Ann., 171, the court says: "The settlement made before the notary, under the order of the judge, . . . sought to be annulled in this suit, was made the judgment of the court by a decree, . . . and before that court alone ought the action to annul the act to have been brought." The action of rescission, which is nearly identical with that of nullity, is expressly required by article 616 of the code of practice to be brought in the court that rendered the judgment.

§ 488. *Legislative construction, though not conclusive, is entitled to weight.*

The fact that an action of nullity can only be brought in the court which rendered the judgment, or in the court to which such judgment is appealed, is entitled to some weight in determining the question now under consideration. It shows that in the estimation of the legislature of Louisiana there is a manifest propriety in submitting the question of the validity of a judgment to the court which rendered it, or to the court which has the right to revise the judgment by way of appeal. We are not disposed, however, to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the courts of the United States. If the state legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the federal courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it.

The classification of the causes of nullity in the Louisiana code into causes relative to form and those relative to the merits is nearly coincident with the classification above suggested, of cases which are, and cases which are not, cognizable in the courts of the United States. Causes of nullity relating to form would fall in that class of cases which could not be brought in these courts, or be removed thereto. The present case is one of that character. It is precisely described in the fourth division of article 606 of the code. In our judgment, therefore, the case was one of which the circuit court could not take cognizance; and, therefore, the judgment must be reversed, and the record remitted with directions to remand the cause to the state court from which it was removed.

So ordered.

ERWIN v. LOWRY.

(7 Howard, 172-184. 1848.)

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—Alfred J. Lowry sued James Erwin in the district court for the ninth district of Louisiana, for a tract of land of about six hundred acres, and forty-four slaves, who were employed in cultivating the land by growing cotton thereon. The property was situate in the parish of Madison, in that state. The suit was commenced in 1841, by petition, which alleges that about July, 1840, one James Erwin, illegally, and by fraud and collusion, and without any legal title thereto, took possession of all the above described property, and is still in possession of the same, has appropriated and wrongfully converted to his own use all the fruits and revenues of said property, and pretends to be the owner thereof, and refuses to deliver to the petitioner the possession. The property was not claimed by Lowry in his own right, but as curator of the estate of Alexander McNeill.

To this petition Erwin answered, among other things not within the cognizance of this court, that on the 6th day of July, 1840, he became the purchaser of the property at public auction, at a sale made thereof by the marshal of the United States, who sold the same under a judgment, and on a writ of seizure and sale, issued from the circuit court of the United States for the eastern district of Louisiana, in a case wherein Andrew Erwin was plaintiff, and Hector McNeill, testamentary executor of Alexander McNeill, deceased, was defendant; and that he paid the sum of \$16,000 in cash therefor, which was applied to the payment of a debt due by mortgage by the succession of Alexander McNeill; and he exhibited a copy of the proceedings on which the sale was founded, and his bill of sale made by the marshal for the land and negroes. These proceedings and the marshal's deed were given in evidence by the defendant on the trial before the state district court. A judgment was there given against Erwin, and the property decreed to Lowry as curator; from which Erwin appealed to the supreme court of Louisiana, where the judgment of the district court was affirmed; and to this judgment Erwin prosecuted a writ of error out of this court, under the twenty-fifth section of the judiciary act of 1789, on the ground that there was drawn in question the validity of an authority exercised under the United States, and that the decision of the supreme court of Louisiana was against its validity. That such was the fact, and that this court has jurisdiction, is not and cannot be controverted. The judgment ordering the seizure and sale was declared void for several reasons. Such of them as are subject to our cognizance we will proceed to consider.

§ 489. *If a judgment brought here under the twenty-fifth section of the judiciary act may be supported on any one ground, it would be useless to reverse it because an error had been committed on some other ground.*

The whole proceeding, commencing with the petition of Andrew Erwin demanding a seizure and sale, to James Erwin's deed from the marshal, was the exercise of one authority; and the question submitted for our consideration is, whether the marshal's sale was void on any legal ground;—that is to say, whether the deed by the marshal to James Erwin was void for the reason that it was not supported by a lawful judgment, or that, for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. If void on any one ground, it would be altogether useless to reverse the judgment because an error had been committed on some other ground; as, on

the cause being remanded, the state court would pronounce the deed void a second time on the true ground. This court was compelled so to hold in *Collier v. Stanbrough*, 6 How., 14.

§ 490. *Where the record establishes the fact of citizenship, it cannot be called in question collaterally and disproved.*

The deed in the case before us was held void by the supreme court of Louisiana: First, because Hector McNeill was not a citizen of that state when Andrew Erwin's petition was filed. This fact the court ascertained by proof *dehors* the record. The petition alleges that Andrew Erwin was a citizen of the state of Tennessee, therein residing; and that Hector McNeill was a citizen of the state of Louisiana, residing in the parish of Madison, and within the jurisdiction of the court. On being served with process, Hector McNeill did not dispute the fact, nor make any defense; the purchaser found the fact established by the record, nor could it be called in question in a collateral action and disproved, and the purchaser's title defeated by inferior evidence. On this question the case of *McCormick v. Sullivant*, 10 Wheat., 192, is entitled to great weight. There, neither party was averred to be a citizen of any state; and the attempt was made by a second suit to treat the purchaser's title as a nullity, because of this defect in the proceeding on which the purchase was founded; but it was held that the purchaser took a good title. In the case before us, the record on its face was perfect, and evidence was let in to contradict and to overthrow it, which we deem to be wholly inadmissible in any collateral proceeding. Hector McNeill was estopped to deny the fact; and so is the present party, his successor.

§ 491. *Though property is in the course of administration in a state probate court, the federal court has power to order a sale under a mortgage in favor of a citizen of another state.*

The next question decided below was that the property when it was seized and sold was part of a succession, and, being in the course of administration in the probate court, could not be seized and sold by an execution founded on a proceeding in another court. This question we declined to decide in the case of *Collier v. Stanbrough*, and ruled that cause on another ground. That a special mortgage, where no succession has occurred, may be foreclosed by this mode of proceeding,—that is, by an order of seizure and sale in the circuit court of the United States held in Louisiana,—we have no doubt. But the question here is, whether jurisdiction could be exercised over mortgaged property whilst it was in a course of administration. That no jurisdiction existed in the United States circuit court was held in the case before us; and so it had been held by the supreme court of Louisiana in previous cases. But in 1847 that court reviewed its previous decisions in the case of *Dupuy v. Bemiss*, 2 La. Ann., 509. In the opinion there given the jurisdiction of the federal court held in Louisiana is so accurately and cogently set forth, and the relative powers and duties of the state and federal judiciaries are so justly appreciated, as to relieve us from all further anxiety and embarrassment on the delicate question of conflict arising in the case of *Collier v. Stanbrough*, and again in this cause. It was held in the case of *Dupuy v. Bemiss*, that where a lien existed on property by a special mortgage before the debtor's death, and the property passed by death and succession, with the lien attached, into the hands of a curator, and was in the course of administration in the probate court, the circuit court of the United States had jurisdiction, notwithstanding, to proceed against the property, and to enforce the creditor's lien, and to decree a sale of

the property, and that such sale was valid. We accord to this adjudication our decided approbation, but take occasion to say that, had we unfortunately been compelled to decide the question without this aid, our judgment would have been that the decision of the supreme court of Louisiana in the cause under consideration was erroneous.

§ 492. *When a judgment is given by a court having jurisdiction of parties and subject-matter, the facts necessary to support the judgment are presumed.*

It was also assumed by the supreme court of Louisiana, "that no explanation was given how the notes secured by the mortgage got into Andrew Erwin's hands in Tennessee, and that no transfer of the mortgage was proved to have been made to him, without which no state judge could have granted an order of seizure and sale without a violation of law." We hold that wherever a judgment is given by a court having jurisdiction of the parties and of the subject-matter, the exercise of jurisdiction warrants the presumption in favor of a purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved. It was so held by this court in the case of *Grignon v. Astor*, 2 How., 319 (§§ 496-500, *infra*), and to the principles there laid down we refer for the true rule. The circuit court may have erred in granting the order of seizure and sale, but this does not affect the purchaser's title.

§ 493. *Though strict compliance with forms is necessary in judicial sales, a debtor may, by his conduct, estop himself from future objection.*

The supreme court of Louisiana next held that "it is well settled in our jurisprudence that, in forced alienations of property, there must be a reasonable diligence in and compliance with the forms of the law, under a penalty of nullity. When a party resorts to the summary and more severe remedies allowed by law, he is then held to a stricter compliance with every legal formality, and the executory process of seizure and sale may be considered as one of severity. It is obtained *ex parte*, and all the proceedings under it are to be scrutinized closely. It necessarily follows that if the law has not been complied with, the property is not transferred, and the purchaser acquires no title." This was the doctrine adopted by us in the case of *Collier v. Stanbrough*, and is no more open to question in the circuit court of Louisiana than it is in the state courts of that state; and the question is, how far the marshal complied with the legal formalities in conducting the seizure and sale. He was bound to give three days' notice to the debtor before the seizure, if he resided on the spot, and if he did not, to count in addition a day for every twenty miles between the residence of the debtor and the residence of the judge to whom the petition was presented. Code of Practice, 735. The notice was given to Hector McNeill on the 29th day of May, 1840, requiring him to pay within three days; the property was seized on the 1st day of June; the advertisements were posted on the 4th of June, and the property sold on the 6th day of July following. The notice was given in the parish of Carroll, about four hundred miles from New Orleans, where the judge resided, so that more than twenty days less than the due time required by law was allowed to the defendant, Hector McNeill, to appear before the judge, obtain an injunction, and make opposition to the proceeding instituted by Andrew Erwin; and for this reason the sale would be void if the defendant, McNeill, had not acted in the matter. But the marshal's returns are required by the practice in Louisiana to show the various steps in the proceedings, and are part of the record on which James Erwin's title depends; these returns show that McNeill was served with process on the spot where the property was, and where the advertisements were posted.

When the sale came on the marshal returns that, "by agreement of the plaintiff and defendant in the suit, that is, Andrew Erwin and Hector McNeill, the following individuals were selected as appraisers, to wit: James Brooks was selected by the plaintiff, and Jesse Couch was selected by the defendant, who, being duly sworn, proceeded to appraise all the property mentioned in the order of seizure and sale; that they appraised the negroes and the land; that is, each slave separately and the land separately." Both land and slaves being immovable property, if two-thirds of the appraised value had not been bid at the sale, a second was necessary by the laws of Louisiana. Code of Practice, 670, 671, etc. And by article 676, "Slaves seized must be appraised, either by the head or by families, and the other effects must be appraised with such minuteness that they may be sold together or separately, to the best advantage of the debtor, and as he may direct."

The marshal's deed to James Erwin recites in general terms all the necessary steps required to be taken previous to the sale; and, after describing in detail all the property, the deed says that "the marshal proceeded to cry the aforesaid land and negroes to go together, at the request of the defendant, Hector McNeill; and that James Erwin became the purchaser for the sum of \$16,000, being more than two-thirds the appraised value of the land and negroes." The general principle as respects third persons is, that where one having title stands by and knowingly permits another to purchase and expend money on land, under the erroneous impression that he is acquiring a good title, and the one who stands by does not make his title known, he shall not afterwards be allowed to set it up against the purchaser. We understand the decisions in Louisiana to conform to this principle, and that it is applicable there in cases of execution sales; and, as lands and slaves stand on the same footing in Louisiana, the rule applies equally to both.

Testing the sale by this principle, how does it stand? The purchaser saw the debtor and the marshal select the appraisers, and saw the appraised value, so that bidders could regulate their bids by it; he heard the debtor order the marshal to sell the plantation and slaves together, and they were so sold. Nor did the debtor make any objection to the sale, but by his acts and presence sanctioned it; and, therefore, it cannot be impeached because formal steps were not strictly complied with. In our opinion the order of seizure and sale, and the steps taken in its execution, were such as to support the sale adjudicated to James Erwin by the marshal; but we only adjudge the force and effect of the legal proceeding. As to any other questions involved in the cause, if there be any, this court has no jurisdiction, and consequently leaves them with the state courts.

§ 494. *Though the losing party receive money from his opponent under a final decree, this does not waive a right of appeal.*

At October term, 1843, the curator, Lowry, had judgment, but the court below ordered "that no writ of possession issue in this case to put the plaintiff in possession of the plantation and slaves until he pay the defendant, or deposit in the hands of the sheriff of the parish, to the credit of the defendant, \$436.55, with interest thereon at the rate of five per cent. per annum from the 18th day of March in the year 1843 until the day of payment or deposit." In August, 1844, Lowry paid over the money to the sheriff of the parish of Madison; and the sheriff paid it over to Erwin in November, 1844. The writ of error was sued out in May, 1845; and there accompanied the record an assignment of errors. The defendant in error now comes forward and asks to have

the writ of error dismissed, on production of a copy of Erwin's receipt to the sheriff, on the ground that, by receiving the money, Erwin released the errors complained of.

§ 495. *Although a decree in equity is fully executed at the instance of the successful party, he cannot complain of his own voluntary acts if he performs a condition imposed upon him before he can have the fruits of the decree, though the other party derives a benefit from such performance.*

In the first place, we think the motion comes too late to be heard, but that, if it could be heard, it is no bar. The proceeding was of a mixed character, partaking more of the nature of a proceeding in equity than one at law; and, although it can only come here by writ of error, yet this does not change its character. A writ of error in equity proceedings is not peculiar. The twenty-second section of the judiciary act of 1789 gave a writ of error in chancery cases, and so the law continued until 1803. Ch. 40. And we take the rule to be that, although a decree in equity is fully executed at the instance of the successful party, he cannot complain of his own voluntary acts if he does perform a condition imposed upon him before he can have the fruits of the decree, although the other party derives a benefit from such performance. If it was otherwise, a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, where there was no *supersedeas*, and here there was none.

Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights. For the reasons above stated we order the judgment of the supreme court of Louisiana to be reversed.

WAYNE and DANIEL, JJ., dissented.

GRIGNON v. ASTOR.

(2 Howard, 319-344. 1844.)

STATEMENT OF FACTS.—The law of Michigan referred to in the opinion is the act of July 27, 1818, which enacts that when it is shown to the proper county court that the estate of a deceased person is insufficient to pay the debts, the court may empower the executors or administrators to sell the whole or any part of the real estate, and to sign and execute the proper conveyances, provided, that before such sale, the executor give thirty days' notice by posting notifications, and that every representation to the county court as above shall be accompanied by a certificate from the probate judge of the county where the estate was inventoried, stating the value of the property and the opinion of the judge as to the necessity of the sale. The court before passing on the representations must give notice to all concerned who do not signify their assent. The executor before any sale must take oath before a probate judge or a justice of the peace that he will use his utmost endeavors to dispose of the property in the way most advantageous to all parties.

Opinion by MR. JUSTICE BALDWIN.

This case comes here on a writ of error from the supreme court of the territory of Wisconsin. The premises in controversy were formerly owned by one Peter Grignon, to whom they were confirmed by an act of congress, passed 21st February, 1823 (3 Stats. at Large, 724), to be found in 3 Story's Laws, 1877. He died in March following, intestate, indebted, and leaving two sons who are lessors of the plaintiff, one born in 1803, the other in 1806. They conveyed one-third to Martin, the other lessor, in 1834. The lessors claim as heirs at law of Peter Grignon, and the conveyance from them to Martin.

In 1824 letters of administration on the estate of Peter Grignon were duly granted to Paul Grignon, the brother of the deceased, who gave bond for the performance of the trust, according to law. In January, 1826, he presented his petition to the county court of Brown county, then in the territory of Michigan, praying for an order from the court to authorize him to dispose of the real estate of the said Peter, which was granted. A license issued to the administrator to sell in March, 1826. A sale was accordingly made to Augustin Grignon, to whom a deed was executed by the administrator in June, 1826, and duly recorded. The defendants claim title under this sale by sundry mesne conveyances from the purchaser. The law of Michigan is set forth in the statement of the case by the reporter.

In the county court the following proceedings were had:

"At a session of the county court for the county of Brown, begun and held at the township of Green Bay, in the school-house, on Tuesday, the tenth day of January, one thousand eight hundred and twenty-six.

"Present: The Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice. The court was opened by George Johnston, sheriff.

"The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the county of Brown (deceased), was filed by his attorney, H. S. Baird, praying for an order from the court to authorize him to dispose of the real estate of said Pierre.

"In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid.

"Minutes read, corrected and signed by order of the court.

"ROBERT IRWIN, JR., Clerk."

"TERRITORY OF MICHIGAN, }
Brown County, } ss.

"*The United States of America, to Paul Grignon, administrator of Pierre Grignon, deceased:*

"Be it known, to all whom it may concern, that at a term of the county court of the county of Brown, continued and held at the township of Green Bay, in said county, on Tuesday, the 10th day of January, in the year of our Lord 1826, before the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice, Paul Grignon, administrator of all and singular the goods and chattels, rights and credits, lands and tenements of Pierre Grignon, deceased, late of the county of Brown aforesaid, represents to this court, then and there in session, that the said Pierre died intestate, at Green Bay, in said county of Brown, on the 4th day of March, A. D. 1823; that at the time of his death the said Pierre was seized in his demesne as of fee in and to the following tracts or lots of land, situated at Green Bay aforesaid, to wit:

"Lot number 3, on the east side of Fox river, bounded north by land claimed

by the estate of Dometile Longevin; south by Augustin Grignon, and four and a half arpens in front and eighty arpens rear.

“Also, lot number 5, on the same side of said river, bounded north by Augustin Grignon’s claim, and south by land claimed and occupied by John Lawe, Esq., being four acres and sixteen feet wide, and extending back eighty acres.

“Also, lot number 3, in dispute between said deceased and George Johnston, on the west side of said Fox river, lately occupied by said George Johnston, bounded north by Louis Grignon, and south by land of said deceased, being eight chains and sixty-two links wide, and eighty arpens deep.

“Also, lot number 4, on the same side of said river, bounded north by the last-mentioned claim, and south by land claimed by John Lawe, Esq., being eight chains and fifty links wide, and extending back eighty arpens.

“And that it has been ascertained by the petitioner that the goods and chattels belonging to the estate of the said deceased are insufficient to pay all the just debts which he owed at the time of his death, but that the estate will be insolvent; and therefore prays that leave may be granted him to dispose of the tracts and lots of land aforesaid.

“Now, therefore, for the causes aforesaid, and for divers other good and sufficient reasons, the court thereunto moving, they do hereby authorize and empower you, the said administrator, to dispose of all the right, title and interest of the deceased in and to the above described tracts and lots of land in such manner as will best serve the interest of all concerned in said estate, requiring of you a due observance of the statute in such case made and provided.

“Witness, James Porlier, chief justice of the county court of the county of Brown, at the township of Green Bay, on the 28th of March, A. D. 1826.

“ROBERT IRWIN, JR., Clerk, B. C.”

At the trial numerous questions of evidence arose, and many instructions were asked of the court, to whose opinion the plaintiffs excepted; but we do not deem it necessary to notice them in detail, as in our opinion the whole merits of the controversy depend on one single question; had the county court of Brown county jurisdiction of the subject on which they acted?

§ 496. *Jurisdiction defined.*

Jurisdiction has been thus defined by this court: “The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition containing all the requisites, and in the manner required by law.” 6 Pet., 709.

“Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial or extrajudicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it.” 12 Pet., 718; S. P., 3 Pet., 205. It is a case of judicial cognizance, and the proceedings are judicial. 12 Pet., 623.

§ 497. *In actions in rem the only question of jurisdiction is the power over the subject-matter, regardless of parties.*

This is the line which denotes jurisdiction and its exercise; in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land (11 S. & R., 432); they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the orphan's court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title, but one paramount. 11 S. & R., 426. The estate passes to him by operation of law. 11 S. & R., 428. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties (11 S. & R., 429), which directs the title of the deceased. 11 S. & R., 430.

§ 498. *When a court has power to order the sale of a decedent's estate, and the record shows a petition and order so to do, the existence of all facts necessary to support the jurisdiction in the particular case is conclusively presumed in the silence of the record.*

As the jurisdiction of such courts is irrespective of the parties in interest, our inquiry in this case is whether the county court of Brown county had power to act in the estate of Peter Grignon, on the petition of the administrator under the law of Michigan, providing, that where the goods and chattels of a decedent are not sufficient to answer his just debts, on representation thereof, and the same being made to appear to the county court where he dwelt, or where his real estate lies, it may license the executor or administrator to make sale of so much as will satisfy the debts and legacies.

No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt, or his real estate was situate, making these facts appear to the court. Their decision was the exercise of jurisdiction which was conferred by the representation, for whenever that was before the court they must hear and determine whether it was true or not; it was a subject on which there might be judicial action. The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons, ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes that they were, such as to justify their action. 14 Pet., 458. But though the order of the court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. 3 Pet., 202; 2 Pet., 165. We all know that even in the old states the records of these and similar proceed-

ings are very imperfectly kept; that where it consists of separate pieces of paper they are often mislaid or lost by the carelessness of clerks, and their frequent changes; regular entries of the proceedings are not entered on the docket as in adversary cases, nor are the facts set forth in the petition entered at large; and it is no matter of surprise that in so new and remote part of the country as the place where these proceedings were had, this state of things should exist. Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on files, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject-matter before the court and their action upon it; that their judicial power arose and was exercised by a definitive order, sentence or decree. 2 Pet., 165. The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale, unless in a case under the third section. The subsequent provisions of the act of Michigan relate exclusively to acts and proceedings in the execution of the order of sale, or are directory to the administrator to accompany the representation with a certificate of the judge of probate, and to the court, before passing on such representation, to order notice to be given to the parties concerned, to show cause why the license should not be granted; but these provisions do not affect the jurisdiction of the court, they apply only to its exercise. After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court; their order of sale is evidence of that or any fact which was necessary to give them power to make it, and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed, after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter.

The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet., 729. A purchaser under it is not bound to look beyond the decree; if there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law.

§ 499. *Distinction between courts of general and those of special or limited jurisdiction. Authorities reviewed.*

These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects. They are not courts of

special or limited jurisdiction; they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities which may be entirely disregarded. 3 Pet., 205. They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent, by its constitution, to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in the proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities. The circuit court of this district has original, exclusive and final jurisdiction in criminal cases; its judgment is a sufficient cause on a return to a writ of *habeas corpus*; "on this writ this court cannot look behind the judgment and re-examine the charges on which it was rendered. A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive in this court as it is on other courts. It puts an end to all inquiry into the fact by deciding it." 3 Pet., 204, 205.

"To determine whether the offense charged in the indictment be legally punishable or not is among the most unquestionable of its (the circuit court) powers and duties; the decision of the question is the exercise of jurisdiction; whether the judgment be for or against the prisoner, it is equally binding and remains in full force until reversed." 3 Pet., 204, 205. If the jurisdiction of the court in a civil case is not alleged in the "pleadings, the judgment is not a nullity, but, though erroneous, is obligatory as one (3 Pet., 206); and in a proceeding *in rem*, an erroneous judgment binds the property on which it acts; it will not bind it the less because the error is apparent, and the judgment is of complete obligation." 3 Pet., 207. The judgment of the circuit court, in a criminal case, "is of itself evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decision." 3 Pet., 207.

These principles have been applied by this court to sales made under the decrees of orphans' courts; where they have power to judge of a matter of fact, "they are not required to enter on record the evidence on which they decided that fact. And how can we now say but that the court had satisfactory evidence before it that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the court

depended on that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question in this collateral way is certainly not warranted by any principle of law." *Thompson v. Tolmie*, 2 Pet., 165 (§§ 475-479, *supra*).

"If the purchaser (under a decree of the orphans' court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men." 2 Pet., 168, citing 11 S. & R., 429.

"The purchaser is not bound to look further back than the order of the court. He is not to see whether the court were mistaken in the facts of debts and children. The decree of an orphans' court in a case within its jurisdiction is reversible only on appeal, and not collaterally in another suit. A title under a license to the administrator to sell real estate "is good against the heirs of the intestate, although the license was granted upon the certificate of the judge of probate, not warranted by the circumstance of the case."

"The license was granted by a court having jurisdiction of the subject; if it was improvidently exercised, or in a manner not warranted by the evidence from the probate courts, yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a court of competent jurisdiction." 2 Pet., 168, and 11 Mass., 227, cited. In that case the jurisdiction of the court was held to attach "when the acceptor dies intestate and any of the persons entitled to his estate is a minor (2 Pet., 165); so in this case it attaches on the decease of any person indebted beyond the personal estate he leaves; and when jurisdiction is once attached to a subject or exists over a person, this court has adopted as a rule applicable to all courts of record that their decisions are conclusive; "it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court." 1 Pet., 340. In *Voorhees v. The Bank of the United States*, the same principle is applied to sales or executions under judgments on adversary process, and such must hereafter be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem*, as *in personam*. 10 Pet., 473.

We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them. The courts of the states have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents, by order of those courts to whom the laws of the states confide full jurisdiction over the subjects.

These sales are less expensive than when made on executions; more time is allowed to make them; the discretion of the court is exercised as to time, manner, and the terms of sale; whereas on sales by a sheriff, all is by compulsion and no credit is allowed; he cannot offer one entire piece of property for sale in parcels; the administrator can divide and sell as best subserves the interest of the heirs, and sell only so much as the emergency of the case requires.

§ 500. *A confirmation of an equitable title by act of congress is even higher evidence of a legal title than a patent.*

It has been contended by the plaintiff's counsel that the sale in the present case is not valid, because Peter Grignon had not such an estate in the premises as could be sold under the order of the county court, it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the act of congress of February, 1823, which was equivalent to a patent. It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers. These views of this case decide it without examining the exceptions to the admission of evidence, the ruling of the court on the instruction prayed, or their charge to the jury. So far as either were unfavorable to the plaintiff, they are most fully sustained by the foregoing principles and cases; the county court of Brown county had undoubted jurisdiction of the subject; their proceedings are irreversible; the title of the purchaser cannot be questioned; and the judgment of the court below must be affirmed, with costs.

MOCH v. VIRGINIA FIRE AND MARINE INSURANCE COMPANY.

(Circuit Court for Virginia: 4 Hughes, 61-125. 1882.)

STATEMENT OF FACTS.— Action upon a judgment rendered against the defendant corporation, in a state court of Louisiana, the process being served upon Taber, an agent of defendant. Defendant appeared specially to the action and filed an "exception" to the petition, chiefly based on the ground that Taber was not such an agent of the company that service of process upon him would bind the company. The exception was overruled and judgment rendered in favor of the plaintiff. There was no subsequent appeal from this decision, and suit was brought in Virginia on the record of this judgment.

Opinion by HUGHES, J.

This case is before me now on the defendant's demurrer to the plaintiff's replication. Avoiding technicalities, the plaintiff's contention is that the defendant was properly sued and brought into court in Louisiana by service of process upon such an agent of the defendant, James W. Taber, as could be served with the process under the laws of that state; that, besides, the defendant appeared to the suit there; pleaded defective service of process; claimed that it was not in court; and was overruled on that issue thus raised by itself, by a court of general and competent jurisdiction; and is therefore estopped from pleading the same matters here.

The contention of the defendant technically alleged by its plea, and set out argumentatively in the very able and learned brief of counsel, is, that the citation served on Taber was insufficient to bring it into court; that its appearance there was only for the purpose of suggesting to the court its want of jurisdiction because of the matters alleged in its "exception" filed there; that it is not bound by the judgment of the court on that or any other question; and that the judgment is a nullity, and would be treated as such in Louisiana, and should be so treated here.

§ 501. *A question of jurisdiction may be brought before the court in Louisiana by "exception" for final decision.*

The first question presented to me, though it is not the pivotal one in this case, is whether the "exception," the "peremptory exception," used in the

practice of Louisiana, is to be treated in common law courts as a plea by which the defendant sets out matters of law and fact in defense of the action and submits himself to the judgment of the court upon them; or is a mere suggestion or protest of record by which the defendant commits himself to nothing at all; as to which it matters not at all to him whether the court considers and passes upon it or not; and which, when entered of record, is a matter of futile surplusage.

Without meaning to refer to such "exceptions" in general, I have to say that, for reasons given in the sequel, I cannot take the latter view of the peremptory "exception" which was pleaded in the suit between these parties in Louisiana, the judgment in which is sued upon here. The code of practice in Louisiana defines peremptory exceptions to be, "those which tend to the dismissal of the suit;" some of them relating to forms, others arising from the law. The exception in this case tended to the dismissal of the suit on the ground that, as a matter of law, the defendant could not be brought into court by service of process upon the agent who, as the petition alleged and the exception did not deny, negotiated the insurance, received the premiums, delivered the policy, and was the acting agent of the defendant in the city of Shreveport; could not, for the reason that he was not what the plea calls the "general" agent of the company in Louisiana, appointed in accordance with the law concerning non-resident insurance companies, enacted in 1877.

I consider that such was the matter of law formally submitted for decision, on the 12th April, 1879, by defendant's counsel in the exception set out in the record; and though the court in its judgment rendered on that day, probably after argument on the exception, does not expressly declare that the exception was formally overruled, yet, that it was overruled, is a necessary implication from the tenor of the judgment.

§ 502. *A corporation doing business in a state other than that of its domicile may be sued there independently of any statute expressly authorizing service of process.*

The court of Louisiana having decided that the defendant was before it by force of the service of citation on its agent, Taber, and not merely by its appearance "alone to file" the exception, it may not be competent for me to pass upon the propriety of that decision; but I feel bound by the earnestness of defendant's contention to look behind the judgment of the court *a quo*, into the validity of the process by which the defendant was held to have been brought into court. That a corporation doing business in a state other than that from which its charter is derived and in which its principal office is held and its chief business is conducted — doing business there and everywhere else, as corporations must of necessity do, through the agency of natural persons — may be sued and brought into court in that state by the service of process on its agent there, independently of any statute law or warrant of attorney, expressly authorizing such service, has been very authoritatively decided.

The case of *Moulin v. Ins. Co.*, 1 Dutch., 57, was similar to the one at bar in its essential features, except that there, there was no conditional appearance in the original suit by the defendant. The defendant was a corporation chartered in New Jersey and having its principal office there. It established a branch office in Buffalo, New York, and did business there for a while; but finally withdrew that office. Suit was afterwards brought against it there, on one of the policies issued from that agency, and process was served on its president, who was a resident of New Jersey, and was casually in Buffalo, not on

the business of his company. On the judgment obtained in the New York suit thus commenced, suit was brought in New Jersey. The pleadings in this latter suit were substantially identical with those in this, except as to the conditional appearance. The opinion was delivered by Chief Justice Green, who said: "If a corporation may sue within a foreign jurisdiction, it should seem consistent with sound principle that it should also be liable to be sued within such jurisdiction. The difficulty is this: that process against a corporation at common law must be served upon its principal officer within the jurisdiction of that sovereignty by which it was created. The rule is founded upon the principle that the artificial, invisible and intangible corporate body is exclusively the creature of the law; that it has no existence except by operation of law, and that, consequently, it has no existence without the limits of that sovereignty, and beyond the operation of those laws by which it was created, and by whose power it exists. The rule rests upon a highly artificial reason, and however technically just, is confined at this day, in its application, within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal, nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has, then, existence, vitality, efficiency beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in the case of a private individual, and that the corporation itself is not present, the answer is, that a corporation acts nowhere except by its officers and agents. It has no tangible existence except through its officers. For all practical purposes its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty which created it, that it may within it. Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has; no body which may exist in one place and be served with process while its agents and officers are in another. Process can only be served upon the *officers* of a corporation within its own jurisdiction, not upon the corporation itself.

"Process cannot be served upon the officer of a corporation in a foreign jurisdiction, because he does not carry his official character and functions with him. And yet, the officers and agents of corporations carry their official character and functions with them into foreign jurisdictions, for the purpose of making contracts and transacting the business of the corporation. The seal of a corporation, its distinguishing badge, at common law the only evidence of its contracts, may be taken by its officers and used within a foreign jurisdiction.

"Doubts were formerly entertained whether a corporation could make a contract or maintain an action out of its own jurisdiction. These questions have been long since settled, either by judicial construction or legislative enactment, in accordance with the reason of the thing and usage of the commercial world. Sound principle requires that while the *powers* of corporations are world-wide, while for all practical purposes they may exist and act everywhere, the technical rule of the common law, that they exist only within the jurisdiction of the sovereignty which created them, should be applied only within its strictest limits, and not be suffered to defeat the obvious claims of justice. . . .

"The question now before the court is not upon the validity of the common law principle; to that we adhere. . . . The utmost that can be said is, that [the service in the suit in New York] was a deviation from the technical

rule of the common law. The defendants were not condemned unheard and without an opportunity of making defense. The process was served precisely upon the officer, and in the mode that it would have been had the process been served in this state. The corporation, it is true, were drawn into the forum of a foreign sovereignty to litigate; but, having voluntarily entered that jurisdiction and transacted business there; having invoked the comity and the protection of the laws of that sovereignty for their benefit, can they complain that the contracts there made are enforced within that sovereignty and in accordance with its laws? Does it involve the violation of any principle of natural justice or that protection which is due to the citizens of our own state? If the corporation were carrying on its business within the state of New York at the time of the service of the process, this court has already intimated its opinion that the service would be valid. In 4 Zabriskie, 234, Justice Elmer said: 'I think, under such circumstances, natural justice requires that corporations should be subject to the laws of the state whose comity they thus invoke. For the purpose of being sued they ought to be regarded as voluntarily placing themselves in the situation of citizens of that state! And such it seems would be the rule, independently of any express statute authorizing the mode of serving process. Angell & Ames on Corporations, § 402. The fact that the corporation had ceased to transact business, whatever technical difficulty it may seem to create, cannot alter the reason and justice of the proceeding.'"

The learned judge distinguishes, of course, between corporations and natural persons, and applies his reasoning only to the former. He treats the existence of the New York statute authorizing the service of process on the officer of a non-resident corporation casually in that state as not affecting the decision of the court of New Jersey in the case. See *Bushel v. Com. Ins. Co.*, 15 Serg. & R., 176, and Angell & Ames, § 402.

The doctrine thus ably laid down by Chief Justice Green has been sanctioned by the congress of the United States, as to the District of Columbia, by section 11 of chapter 64 of the acts of 1867 (14 Stat. at Large, p. 404), which provides that, in actions against foreign corporations brought in the District, all process may be served upon the agent of such corporation or person conducting its business in the District. And in *Railroad Company v. Harris*, 12 Wall., 65, Mr. Justice Swayne, speaking for the United States supreme court, said: A corporation "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have consented, and will be bound accordingly." This language was cited with approbation and adopted as a correct exposition of the law by the same court in *Railway Co. v. Whitton*, 13 Wall., 270 (§§ 585-588, *infra*), and *Ex parte Schollenberger*, 6 Otto, 376 (§§ 1356-58, *infra*).

The case of *Michael v. Ins. Co. of Nashville*, 10 La. Ann., 737, which was decided in 1855 (before the statute of 1877), sustains the decision in *Moulin v. Ins. Co.*, rendered in the same year. In it the supreme court of Louisiana not only held that a non-resident corporation could be sued through its resident agent, but that this right could not be destroyed by a revocation of the powers of an agent previously to a suit. The policy sued upon in that case covered the year 1852. The property insured was burned in August of that year. Suit was brought on the 14th of October following, and citation served on W. A. Johnson, the agent through whom the policy was taken out, in November, 1852.

By its exception the defendant pleaded that the "agency of said insurance company in New Orleans had been some time since withdrawn." In support of the exception a telegraphic dispatch was proved, dated at Nashville on the 29th September, 1852, and received the same day, declaring that the company had withdrawn its agency from New Orleans, and directing that risks should be declined after the 1st of October ensuing. The court held that the service of process was valid and effective.

The case of *Weight v. Liverpool L. & G. Ins. Co.*, 30 La. Ann., 1186, is an authority only apparently contrary to this principle. It arose before the statute of 1877. It decided that a foreign corporation, represented by a general agent and local board of directors residing in New Orleans, could not be brought into court by a citation served on a local agent domiciled in one of the county towns of Louisiana, who was only authorized to receive applications for insurance and give binding receipts for the same, and who had not exercised or represented that he possessed any other authority. But in that case the corporation, by having a principal office, a general agent for all purposes, and a local board of directors in New Orleans, was practically domiciled there, and there was no hardship in requiring service of process to be made on its general agent. It was, besides, proved affirmatively that the agent in the interior had no other authority, and was known to have none other, than to take risks. On the general principles so ably enforced by Chief Justice Green, I would not feel justified in treating as a nullity the judgment of the court of Louisiana virtually establishing the validity of the service of process on the business agent of a non-resident insurance company issued to commence a suit founded on a transaction with that agent, even if there were no statute in Louisiana authorizing such service.

§ 503. *Statute of Louisiana authorizing service upon an agent.*

But the statute of that state passed in 1877 comes in aid of the general principle, and seems to have expressly rendered such an agent as Taber was amenable to the process which was served on him. Though the last clause of the first section of that act seems to imply that some one agent of every non-resident insurance company shall be the person empowered to be served with and to accept service of process for the whole state, yet the act speaks nowhere of a "general" agent, as the defendant's plea does; and the first clause of section *first* and the whole tenor of section *fourth* unite in providing that every agent who does business for a non-resident insurance company in the state, either in taking risks, *or* receiving premiums, or transacting any business, shall first have been appointed and empowered respecting process, as provided in the first section. If so, then Taber must be presumed to have been so empowered; and the defendant would not be heard to deny that it has, in respect to him, complied with the requirements of the statute. For a corporation to seek to avoid its own contract by reason of a *misnomer* is reprehended by Lord Coke as a pernicious novelty, which "till this generation of late times was never read of in any of our books." *Sir Moyle Finch's Case*, 6 Rep., 65a. Surely a corporation's neglect to produce a certificate necessary to vindicate itself and its agent from crime should not be allowed to exempt it from liability for that agent's acts.

§ 504. *Suit may sometimes be maintained upon a foreign judgment obtained where defendant was a citizen, though the latter was never served with process.*

There is abundant authority to show that a suit may be maintained upon a foreign judgment recovered in a country of which the defendant, even though

a natural person, was a citizen or resident, according to the laws of that country, though process was never in fact served upon him at all; and that such a judgment will not be deemed void as repugnant to natural justice. In *Douglas v. Forest*, 4 Bingh., 686, the court of common pleas held that an action may be maintained in England upon a Scotch judgment recovered upon a debt contracted in Scotland, by a native of that country, though the defendant was abroad when the cause of action accrued, though no process was served upon him, and though he never knew of the existence of the action. The laws of Scotland allowed such a suit as that in which the Scotch judgment was rendered.

In *Bank of Australia v. Nias*, 16 Ad. & Ell., 717, it appeared that the statute of a British colony authorized suits against members of a corporation individually for liabilities of the corporation collectively, in a manner unknown to the laws of England, and seemingly repugnant to natural justice. But in an action in England brought on a foreign judgment against one corporator founded on such a liability, it was held that a plea setting out such a fact is insufficient.

In *Becquet v. McCarthy*, 2 Barn. & Ad., 953, it appeared that the statute law of a British colony authorized that, in suits against absent parties to contracts made in the colony, process might be served on the attorney-general of the colony. In a suit in England upon a colonial judgment obtained after such service of process, it was held that such a law did not render void the judgment.

In *Godard v. Gray*, L. R., 6 Q. B., 139, decided in 1870, where the contract sued upon abroad was made in England, and the foreign judgment obtained upon it was rendered on a misconstruction of the contract; yet, in a suit in England upon this judgment, the court held that the facts could not be gone into. See, also, *Schibsby v. Westenholz*, L. R., 6 Q. B., 155.

§ 505. *Estoppel by judgment of a foreign court.*

The defendants in these several cases were held to be estopped by the judgments of courts of competent jurisdiction abroad. The whole subject of foreign judgments *in personam*, in their relation to the question of estoppel, has been so fully discussed in *Bigelow on Estoppel*, that I need not do more than refer to the many cases cited below and in that work. The author concludes his review of the subject by the remark, that, although parties to a foreign judgment are not ordinarily estopped to deny the jurisdiction of a foreign court, yet, if in any case there had been an issue made in the foreign suit between the parties on this particular point (as was done in Louisiana between the parties to this suit), and this issue was decided in favor of the jurisdiction, the decision would probably bar a retrial of the same question in another forum between the same parties.

I admit that the law on the power of a court to inquire into the jurisdiction of a foreign court over parties defendant is very unsettled. This question and those of *res judicata* and estoppel have been considered or passed upon, severally or together, in 1 Kent's Com., 261, 262, and notes; Story's Conflict of Laws, § 608, references and note; 1 Rob. Prac., 219; 6 id., 437; 7 id., 109; 1 Smith's Lead. Cases, 1118-46; 2 id., 828; Judge Moncure's opinion in *Bowler v. Huston*, 30 Gratt., 266; Note to *Shuman v. Stillman* (from 6 Wend., 447), in 15 Am. Dec., 378; Note to *Pixley v. Winchell* (7 Cow., 366), in 17 Am. Dec., 525; Note to *Messier v. Goddard* (7 Yeates, 533), in 1 Am. Dec., 325; *Benton v. Burgot*, 10 Serg. & R., at 241; *Rocco v. Hackett*, 2 Bosw., 579; *Nurie v. Castrique*, 8 Com. B., N. S., 405; S. C. in error, L. R., 4 Ho. L., 414.

§ 506. *Authorities on the effect of the records of a foreign court, within the United States, when shown in evidence.*

The act of congress of May 26, 1790, ch. 11 (1 Stat. at Large, p. 122), provides that the records and proceedings of the courts of the several states, properly authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are taken. It was passed in pursuance of section 1 of article IV of the constitution of the United States. It not only provides that such records shall be received as *evidence*, but if, in the state where judgment was rendered, it was evidence of the highest nature, namely, record evidence, this act of congress, in declaring it to be the highest evidence, declared the effect which the judgment was to have in all the courts of the United States. The principal federal authorities on this subject are *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat., 234; *Knowles v. Gaslight & Coke Co.*, 19 Wall., 58; *Thompson v. Whitman*, 18 Wall., 457; *Hill v. Mendenhall*, 21 Wall., 453; *Lafayette Ins. Co. v. French*, 18 How., 404; *Williamson v. Berry*, 8 How., 496, 540; *Glass v. Sloop Betsy*, 3 Dal., 7; *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Peirsol*, 1 Pet., 328; *Shriver v. Lynn*, 2 How., 59; *D'Arcy v. Ketchum*, 11 How., 165; *Webster v. Reid*, 11 How., 437; *Nations v. Johnson*, 24 How., 195; *Christmas v. Russell*, 5 Wall., 291, 305; *Pennoyer v. Neff*, 5 Otto, 714. And on the subject of service of process on a corporation chartered in another sovereignty, see *Railroad Co. v. Harris*, 12 Wall., 65; *Railroad Co. v. Whitton*, 13 Wall., 270 (§§ 585-588, *infra*); and *Ex parte Schollenberger*, 6 Otto, 369 (§§ 1356-58, *infra*).

§ 507. *Where a court of general jurisdiction passes upon any question within its competency, the parties to the litigation are concluded in every court except an appellate court.*

It does not follow, however, that even though a home court may inquire into the jurisdiction of the court of another sovereignty, therefore the parties to a litigation there are not bound in the home court by the principle of *res judicata*. The two questions are distinct and should not be confounded. Whether or not Taber was "such an agent of the defendant as that service of citation upon him would bind the defendant and bring it into court" was the precise question presented to the court in Louisiana, not only in *ipsissimis verbis* by the defendant's exception, but by the showing of the record; and was the only question open to debate; for the proofs were apparently conclusive on the merits. This question was not only decided by the Louisiana court, but I think rightly decided; the court holding properly that the corporation was before it as defendant to the action, as well as before it for the special purpose of pleading to the jurisdiction.

Now, it is not denied that the court whose judgment I am considering was one of general jurisdiction, and, as such, competent to pass upon the validity of process issued by its clerk to bring a defendant before it; and there is very high authority both in Louisiana and Virginia, holding that when such a court passes upon a question within its competency, in a litigation between two parties, those parties are concluded in every other court but an appellate one, on that question.

In the case of *Verneuil v. Harper, sheriff, and Feitel*, 28 La. Ann., 893, there had been a proceeding by Feitel against Verneuil to revive a judgment obtained nine years before, to which an exception had been filed by Verneuil denying his identity with the original defendant. After a hearing upon the proofs

taken upon this issue there had been judgment overruling the exception and reviving the original judgment. Upon this second judgment execution was issued and property about to be sold in satisfaction by Harper, the sheriff. Whereupon Verneuil filed a petition for an injunction, and got a rule to show cause why it should not be granted, to stay the sheriff's sale. The petition denied the identity of petitioner with the defendant in the original judgment; that is to say, set up the same defense in the last proceeding which had been made in the second. Feitel filed an exception in the nature of a plea of *res judicata*, which the court *a quo* sustained. The cause went up to the supreme court of Louisiana, which in the opinion delivered, amongst other things, said: "The question [of identity] was litigated at the instance of Verneuil himself; it was solemnly determined against his pretensions, and he took no appeal. . . . We are bound to assume that the decision was right. The presumption in such cases is in favor of the probity of witnesses and the intelligence of the judge. *Res judicata pro veritate accipitur.*"

In the case of *Cox v. Thomas*, 9 Gratt., 323, Thomas had been a sheriff, and there was a motion in the circuit court of his county, by his administratrix, to recover from Cox, his deputy, and the sureties of Cox, the amount of a judgment which had been recovered against the administratrix for money which had been collected by the deputy on an execution issued out of the *county* court of that county. It appeared from the face of the judgment that the execution upon which the deputy had collected the money had issued from the county court, on a judgment of the circuit court, although sec. 48, 1 Rev. Code of 1819, p. 542, required the creditor to move in the court whence the execution issued, and the record did not show jurisdiction in the circuit court by removal from the county court. The court of appeals held that removal must be presumed from the fact that the circuit court had given judgment. Judge Allen, in rendering the decision of the court of appeals of Virginia, said: "If the jurisdiction of the circuit court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The circuit court is one of general jurisdiction. . . . The jurisdiction of the court to take cognizance of all controversies between individuals in proceedings at law need not (as in cases of limited and restricted jurisdiction) appear on the face of the proceedings. Where its jurisdiction is questioned it must decide the question itself. Nor is it bound to set forth on the record the facts upon which its jurisdiction depends. Wherever the subject-matter is a controversy at law between individuals the jurisdiction is presumed from the fact that it has pronounced the judgment; and the correctness of such judgment can be inquired into only by some appellate tribunal."

And then the learned judge, after showing that the circuit court had jurisdiction of the subject-matter involved, went on to say as to the parties: "The judgment in this case must be considered as conclusive for another reason. Both parties appeared, and the defendant either submitted to the jurisdiction or it was decided against him. In such case, as President Tucker, in *Fisher v. Bassett*, 9 Leigh, 119, observed, the question whether the general jurisdiction of the court over matters of that description embraced the particular case, having been decided by its judgment, can never be raised again, except by proceedings in error."

If the court of general jurisdiction, in rendering a judgment, has passed expressly upon the jurisdictional facts, and found them sufficient, the parties and

their privies are estopped in collateral actions to litigate the matter again. *Sheldon v. Wright*, 5 N. Y., 497; *Dyckman v. New York*, 5 N. Y., 434. The courts of one state will not allow parties to show that a court of another state has made an erroneous decision upon issues between the same parties raised before and decided by it. *Nurie v. Castrique*, 8 Com. B., N. S., 405; and *S. C. in error*, L. R., 4 Ho. of L., 414. See, also, *Drury's Case*, 8 Coke, 141 b; and *Tarlton v. Fisher*, Doug., 671.

These decisions are but examples, among many, to show that where a question, even a question of jurisdiction, has been once litigated between two parties by a court of general jurisdiction, it is to be treated as *res judicata* between the same parties in every other but an appellate forum; and that where, in a litigation between parties in such a court, the question of jurisdiction over parties must have been considered, another court will presume that the court *a quo* did consider it, and treat that question as *res judicata*. No sound reason can be given why the principle should not apply in a domestic court against parties to a litigation in another sovereignty before a court of general jurisdiction there. And although the authorities show that the home court may look into the jurisdiction of the foreign court both as to parties and subject-matter, yet they also show that the parties to the other litigation are bound by the principle of *res judicata* when they come into the domestic court.

While, therefore, this court is not precluded from looking behind the judgment of the court of Louisiana, and judging for itself of the validity of the process by which the defendant is claimed to have been brought into that court, yet that power of the court which is established by the weight of the authorities should not be confounded with the very distinct question, whether the parties to a litigation in a foreign court of general jurisdiction are not bound by its decree on an issue raised between themselves, whether that issue be on the validity of process there or on the merits.

Though the principle laid down by Judge Allen does not apply to the prejudice of the power of this court to look behind the Louisiana judgment, it does apply to the plea of the defendant. If the defendant had not appeared by counsel as it did, the simple question here would have been upon the validity of the process that was served there, and of the judgment by default that was rendered there. But having appeared in a court of general jurisdiction, and formally submitted to that court the question whether Taber was such an agent as that service of citation upon him would bring it into court, and that court having decided against it, the issue thus raised by itself, I am bound to consider the defendant estopped by the Louisiana judgment from retrying that question here.

On the whole case, in conclusion, I concur in the view taken of it by plaintiff's counsel in Louisiana, expressed in the language quoted in the brief of plaintiff's counsel here. "It appears to me that the appearance, called an exception, put at issue the agency of Taber. The plaintiff had broadly averred in her petition that Taber was the agent of the defendant; that her contract was made with Taber as the agent of the defendant; that she paid the premiums to him as agent of the defendant, and that the defendant had ratified and confirmed the contract made by Taber by accepting and using the premiums paid. These facts alleged by the plaintiff were the material substance of her case; and the paper called an exception was nothing more than an answer and denial of these material facts alleged by the plaintiff. That issue was tried, and proof made, that Taber did make the contract and no one else did, and the

premiums did go to the defendant. It is true that no certificate was shown from the secretary of state under the statute of 1877; but the defendant is always presumed to have complied with the law, and cannot be heard to say that he violated our laws by taking risks or transacting business so positively forbidden by law, in order to reap a reward, or to avoid an obligation based upon his own wrong and turpitude."

The defendant's demurrer to the plaintiff's replication must be overruled.

BOND, J., concurred.

KEMPE v. KENNEDY.

(5 Cranch, 173-187. 1809.)

ERROR to U. S. Circuit Court, District of New Jersey.

STATEMENT OF FACTS.—The lessee of Grace Kempe, a British subject, brought ejectment in the circuit court for New Jersey, against Kennedy, for land in New Jersey. Grace Kempe, who owned the land in fee, lived in New York before the Revolution, and removed with her husband to Great Britain after the evacuation of New York by the British. The defendant relied upon a judgment of the inferior court of common pleas of New Jersey upon an inquisition, confiscating the land for treason of its owner, and a deed from the agent of New Jersey. Defendant had judgment in the court below.

Opinion by MARSHALL, C. J.

In this case two points are made by the plaintiff in error: 1. That the judgment rendered by the court of common pleas, which is supposed to bar the plaintiff's title, is clearly erroneous. 2. That it is an absolute nullity, and is to be entirely disregarded in this suit.

However clear the opinion of the court may be, on the first point, in favor of the plaintiff, it will avail her nothing unless she succeeds upon the second. Without repeating, therefore, those arguments which have been so well urged at the bar, to show that the inquisition in this case did not warrant the judgment which was rendered on it, the court will proceed to inquire whether that judgment, while unreversed, does not bar the plaintiff's title.

§ 508. *Courts of general jurisdiction are not inferior courts in a technical sense.*

The law respecting the proceedings of inferior courts, according to the sense of that term as employed in the English books, has been correctly laid down. The only question is, was the court in which this judgment was rendered "an inferior court," in that sense of the term? All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried; but they are not, therefore, inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.

§ 509. *A judgment of a court not inferior, though evidently erroneous, is binding until reversed.*

In considering this question, therefore, the constitution and powers of the court in which this judgment was rendered must be inspected. It is under-

stood to be a court of record, possessing in civil cases a general jurisdiction to any amount, with the exception of suits for real property. In treason, its jurisdiction is over all who can commit the offense. The act of the 4th of October, 1776, defines the crime, and that of the 20th of September, 1777, prescribes the punishment. The act of the 18th of April, 1778, describes the mode of trial, and the tribunal by which final judgment shall be rendered. That tribunal is the inferior court of common pleas in each county. Every case of treason which could arise under the former statutes is to be finally decided in this court. With respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused.

The act of the 11th December, 1778, extends the crime of treason to acts not previously comprehended within the law, but makes no alteration in the tribunal before which this offense is to be tried, and by which final judgment is to be rendered. This act cannot, it is conceived, be fairly construed to convert the court of common pleas into a court of limited jurisdiction, in cases of treason. It remains the only court capable of trying the offenses described by the laws which have been mentioned, and it has jurisdiction over all offenses committed under them. In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and if an offense, punishable by the law, had been in fact committed, the accused was amenable to its jurisdiction, so far as respected her property in the state of New Jersey. The question whether this offense was or was not committed, that is, whether the inquest which is substituted for a verdict on an indictment did or did not show that the offense had been committed, was a question which the court was competent to decide. The judgment it gave was erroneous, but it is a judgment, and, until reversed, cannot be disregarded.

This case differs from the case from third Institute in this: In that case the court was composed of special commissioners authorized to proceed, not in all cases of treason, but in those cases only in which an indictment had been taken before fifteen commissioners. Their error was not in rendering judgment against a person who was not proved by the indictment to have committed the crime, but who, if guilty, they had no power to try. The proceedings there were clearly *coram non iudice*. It is unnecessary to notice the eleventh section of the act, since, without resorting to it, this court is of opinion that there is no error in the judgment of the circuit court. It is affirmed, with costs.

BLOUNT v. DARRACH.

(Circuit Court for Pennsylvania: 4 Washington, 657-662. 1827.)

STATEMENT OF FACTS.—The bill was filed against the executors of Darrach, the former guardian of the female plaintiff praying for an account of the guardianship. Defendants filed a plea stating that Darrach after the termination of his guardianship had filed his account in the orphan's court, by which, after some corrections, the accounts were allowed.

Opinion by WASHINGTON, J.

This cause having been set down to be argued on the plea, the allegations contained in it must all be taken as true. The single question which arises upon the facts stated in the plea is, whether the account of the guardianship of James Darrach, which by the decree of the orphan's court was allowed and confirmed, is conclusive or not, so as to be a bar to the discovery and relief sought to be enforced by this bill?

§ 510. *The general rule as to the conclusiveness of judgments.*

The general principles of law in respect to the conclusiveness of the judgments and decrees of the domestic tribunals of the country are well settled, and perfectly intelligible. A judgment or decree of a court of competent jurisdiction, directly upon the point, is conclusive between the same parties, or their privies, upon the same matter, coming directly in question in another court of concurrent jurisdiction. The rule is founded upon considerations as well of abstract justice as of public policy, which forbids the litigation of any matter which has been once fairly determined by proper and competent authority between the same parties, or those standing in the relation of privies to them. If the matter or the parties be different, the former judgment, if admitted in evidence at all, as in particular cases it may be, can be so only as *prima facie* evidence, but not conclusive. And so extensive and universal is this principle, that it includes the judgments or determinations of tribunals having competent authority to decide whether they be of record or not. Where the matter adjudicated is by a court of *peculiar and exclusive jurisdiction*, and the same matter comes incidentally before another court, the sentence of the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers. *Duchess of Kingston's Case*, 11 St. Tr. Stra., 481; *Doug.*, 407; 2 H. Blac., 416; *Harg. Law Tracts*, 446.

The subjects of inquiry then in the present case are: Had the orphan's court jurisdiction of the matter on which they made their decree? Is that the same matter which this bill seeks to litigate in this court? Are the parties the same or in privity with those who were parties in the orphan's court? And lastly, how far is that decree binding on the plaintiff in consideration of the infancy of Elizabeth Knight at the time it passed?

§ 511. *Under the laws of Pennsylvania the orphan's court has power to settle the accounts of guardians, and its decisions are final except on appeal.*

1. By the act of assembly of 1713, of this state, "for establishing the orphans' courts," they are declared to be "courts of record," with power to call on executors, administrators, guardians and others, who are intrusted with or accountable for property, real or personal, belonging to any orphan, and cause them to exhibit true and perfect inventories and accounts of the said estates. By the third section of this act, the orphan's court, upon complaint being made that any person having the care and trust of a minor's estate is like to prove insolvent, or shall refuse or neglect to exhibit true and perfect inventories, or to give full and just accounts of the estates come to their hands or knowledge, is required to cause such guardians or tutors of orphans or minors to give such security as the court may think proper. The sixth section provides that guardians shall not be liable for interest but for the surplusage of the estate remaining in their hands or power, belonging to the minor, when the *accounts of their administration are, or ought to be, settled and adjusted before the orphan's court, or register general, respectively*. The eighth section invests this court with a power to issue attachments for contempt, against those who have been summoned to appear therein, and to enforce obedience to their warrants, sentences and orders concerning any matter cognizable therein, as fully as any court of equity can do. The party aggrieved by any final sentence of the said court is, by the succeeding section, allowed an appeal to the supreme court. The eleventh section declares that, when any minor shall attain to full age, if the person intrusted or concerned for them as before mentioned shall have rendered his accounts to the orphan's court, according to the direction of this and other

acts, and paid the minor his full due, the minor shall acknowledge satisfaction in the said court; and if he refuse to do so, the court is required to certify how the said person concerned has accounted and paid, which shall be a sufficient discharge of the guardian, etc., who shall so account and pay, and thereupon his bond shall be delivered up and canceled. By the tenth section of the act of 1807, where the personal estate of a minor is insufficient for his maintenance and education, the orphan's court may allow the guardian to sell so much of the real estate as may be necessary for those purposes; and, in a note to Smith's edition of the laws, vol. I, p. 87, he observes that the persons directed to sell are most commonly obliged, by the acts authorizing the same, to exhibit their accounts for settlement in the orphan's court.

Upon a view of the above provisions respecting the orphan's court, I could not entertain a doubt, were the question before me for judgment for the first time, that that court has jurisdiction to settle and to allow or confirm the accounts of guardians, and finally to decide upon the different items of those accounts, subject to the reversing and correcting jurisdiction of the supreme court. But if this point were at all doubtful, I take it to be settled by the decision of the supreme court of the state in *Richard's Case*, 6 Serg. & Rawle, 462. That case came on upon a rule to show cause why the wards should not be permitted to appeal on giving security for costs only; in which it was decided that an order of confirmation by the orphan's court of a report of auditors on a final settlement of a guardian's account is a final decree, but that that court has no authority to go further and to decree payment of a balance *from the ward* to the guardian on such settlement. "It is going far enough," observes the learned judge who delivered the opinion of the court, "to say the confirmation of the account shall discharge the guardian, without directly involving the ward in personal liability." It is added, "the orphan's court is *ex officio* the protector of the ward, and interferes no further than to compel the guardian to account with him."

2. The next inquiry is, whether the matter decreed by the orphan's court is the same which this bill seeks to litigate? Upon this subject there can be no doubt. The matter presented to that court by the executors of James Darach for its consideration and decision was the guardianship accounts of their testator of the estate of his ward, Elizabeth Knight. That account was referred by the court to auditors, who made their report, stating the balance due by the decedent to his late ward, and this report was, by a decree of the said court, allowed and confirmed. The object of this bill is to open that account for the purpose of enabling the plaintiff to surcharge and falsify it in the particulars stated in the bill. The prayer of the bill, both as to discovery and relief, is confined to that object.

§ 512. *A ward becomes a party to proceedings in court by the appearance of his guardian.*

3. The next inquiry is, was Elizabeth Knight, in whose right the plaintiff claims, a party to the proceedings in that court upon which the decree of confirmation was passed? The plea states that her guardian, duly appointed by the orphan's court, appeared before the auditors, litigated the account presented by the executors, and, by objections successively made to some of its items, increased the balance which was finally reported and decreed in favor of his ward. Will it be doubted that he legally represented his ward so as to make her a party to the proceedings before that court? By the seventh section of the act of 1713 before referred to (1 Smith, 184), the orphans' courts are

authorized to appoint guardians, next friends or tutors, over minors, “who shall be allowed and received without further admittance to prosecute and defend all actions and suits relating to the orphans or minors in any court of the province.”

§ 513. *A minor, when party plaintiff, is ordinarily as much bound by a decree as an adult.*

Lastly, it is to be seen how far the decree of the orphan's court, made during the minority of Elizabeth Knight, is binding upon her or those claiming in her right? The general rule of the court of equity is that no decree can be made *against* an infant without giving him a day to show cause after he comes of age. When he is plaintiff he is, unless under extraordinary circumstances, as much bound by a decree, and as little privileged, as an adult. And even in the former case he will not be permitted to travel into the account, or, where a foreclosure has been decreed, to redeem by paying what is reported due, but is only allowed to show an error in the decree. If at law he suffer a recovery, he is so far bound that he cannot enter on the land until he has reversed the judgment upon writ of error.

It is probable that in this case the plaintiff, in right of his wife, might be permitted, in the orphan's court, to show cause against the decree of that court rendered during her infancy, by showing specific errors in the account, or that the subject might be re-examined in the supreme court by appeal or writ of error. As to this matter, however, it would not become me to give an opinion. But it is clear to my mind, beyond all question, that the correctness of the decree of the orphan's court cannot be examined into by this court, which can only claim to exercise concurrent jurisdiction to compel guardians to settle their accounts where they have not done so before some other competent tribunal. The plea, therefore, averring that the balance decreed by the orphan's court has been paid, and relying upon that decree in bar of the other parts of the bill, is what it professes to be, an answer to the whole bill, and consequently I must decree the bill to be dismissed with costs, but without prejudice to any remedy which the plaintiff may think fit to pursue elsewhere.

BOSWELL *v.* OTIS.

(9 Howard, 336-350. 1849.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is before us on points certified, on which the opinions of the judges of the circuit court of the United States for Ohio were opposed. In 1825 a bill was filed by Thomas L. Hawkins, in the court of common pleas for Sandusky county, Ohio, against Thomas E. Boswell and others, which represented that in the year 1816 Boswell, of the state of Kentucky, the complainant, Reed, and Owings, agreed to build a saw-mill on the public land, with the view of purchasing the land when sold by the government. Boswell and Owings advanced a part of the money; the complainant was to be the active partner, and his share of the capital was to be paid by labor. That he expended labor and money until the land was sold in 1818, at Wooster, in Ohio, when Reed and Owings abandoned the contract; and it was then agreed by Boswell, William T. Barry, of Kentucky, and William Whitimore, of Boston, and the complainant, to go on and purchase lot number 9, or a large part of it, on which the building for the mill had been commenced. The purchase was made, and it was agreed that the complainant's share of the purchase

money should be paid in labor on the mill and in improvements on the land. That he should be the active partner, etc.

The complainant proceeded in the construction of the mill, and expended for the company the sum of \$5,000, of which he advanced \$2,600, besides his own time; that the complainant expected his partners would have conveyed to him one-fourth of the land purchased, they having obtained a legal title to two-thirds of the lot, but that they have refused to do the same or to account and refund him the money expended, etc. And the complainant prayed a decree for one-fourth part of the land to which the defendants have obtained a title, and also that they may account, etc.

The defendants being non-residents of Ohio, the court ordered nine weeks' notice to be given in a newspaper, as the statute requires. There being no appearance of the defendants, the bill was taken as confessed, and the matter was referred to a master, who reported a balance against them, and in favor of the complainant, of the sum of \$1,844.17, for which a final decree was entered, and it was adjudged that it should have, from the time of its being pronounced, the operation and effect of a judgment at law, and be a lien on all the town lots of the defendants, and all other real estate owned by them within the county. And execution was authorized, etc. Several executions were issued and a number of lots were sold, among others lot number 7, containing seventy-seven acres and seventy-five hundredths, for which the sheriff's deed was executed.

For this lot number 7 an ejectment was brought by Boswell in the circuit court of the United States, and issue being joined, on the trial the following questions were raised, on which the opinions of the judges were opposed: "1. Whether or not the proceedings and decree of the said court of common pleas of Sandusky county, set forth in the record above stated, are *coram non judice*. 2. Admitting said proceedings and decree to be valid so far as relates to the land specifically described in the said bill in chancery, whether or not said proceedings and decree are *coram non judice* and void so far as relates to lot number 7, in controversy in this case, and which is not described in said bill in chancery; or, in other words, whether said proceedings and decree are not *in rem*, and so void and without effect as to the other lands sold under said decree."

As the title to lot number 7 only is involved in the ejectment suit, it is unnecessary to consider the first point certified. Under the decree, which was only for money, many lots were sold by the sheriff that are still held, it is presumed, under his deed; but the holders are not parties to this suit, and it may be decided without affecting their interests.

§ 514. *When a court obtains jurisdiction of a defendant by a procedure against his property only, that jurisdiction is limited to that specific property.*

When the record of a judgment is brought before the court, collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary

cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character.

The chancery act of Ohio, of 1824, confers on the court of common pleas general chancery powers. In the twelfth section, jurisdiction is given over the rights of absent defendants, on the publication of notice, "in all cases properly cognizable in courts of equity, where either the title to or boundaries of land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract." Under this statute, the bill by Hawkins purports to have been filed. But, without reference to the other lots sold under the decree, there is no pretense to say that the bill had any relation to the title or boundaries of lot number 7, or to any contract for the conveyance of the same. And it is only in these cases that the act authorizes a chancery proceeding against the land of non-residents by giving public notice. It is a special and limited jurisdiction, and cannot be legally exercised, except within the provisions of the statute.

The principle is admitted that, where jurisdiction is acquired against the person by the service of process or by a voluntary appearance, a court of general jurisdiction will settle the matter in controversy between the parties. But this principle does not apply to a special jurisdiction authorized by statute, though exercised by a court of general jurisdiction. The present case will illustrate this view. Admit that a special jurisdiction was acquired against all the other lots, yet number 7 was in no way connected with them. It was not named in the bill, nor was there any step taken in relation to it, until it was levied on by the sheriff to satisfy the general decree. It was not within any one of the categories named in the statute. Until long after the decree, the title to it was not obtained by defendants. If it can be made subject to such a procedure, then the special jurisdiction given by the statute is converted, by construction, into a general proceeding against the property of non-residents by a mere publication of notice.

The property of an individual is subject, in a certain sense, to the law of the state in which it is situated. It is liable for taxes and to such special proceedings against it as the law shall authorize. An attachment may be laid upon it, and it may be sold in satisfaction of an established claim. And the legislature may, perhaps, subject other lands to the payment of the judgment on the attachment after the sale of the lands first attached. But no such proceeding is authorized by the act under which this procedure was had. It is limited to the cases enumerated in the statute. It is said that the statute authorizes a decree for money. This may be admitted. Under the rescission of a contract, the money paid may be decreed to be refunded, and the land covered by the contract, being within the special jurisdiction of the court, may be ordered to be sold. But the power of the court is limited to this. Under the assumption of a special power, it cannot be made general by any supposed necessity, beyond the provisions of the act. Such a construction would not only pervert the object of the legislature, but it would sacrifice the property of an individual without notice in fact, and who had no opportunity to make his defense. The proceedings in this case are a practical commentary upon this construction.

§ 515. *Where a court proceeds against a non-resident on whom no process has been served, without jurisdiction conferred by law, its acts are absolutely void.*

It is said, if this construction of the act be erroneous, it does not make void the proceedings, and that the error can only be corrected by an appellate court.

And we are referred to the case of *Lessee of Boswell v. Sharp*, 15 Ohio, 447, in which it is alleged that the supreme court of Ohio sustained the decision of the common pleas on the question now before us. In that case the supreme court did hold that the court of common pleas of Sandusky had jurisdiction in the chancery proceeding, and that the validity of the same could not be questioned collaterally. But that decision was made in reference to a part of lot number 9, on which the mill was constructed, and to obtain a title for a part of which the bill was filed. The title to lot number 7 was not involved in the case before the supreme court, and consequently they did not consider it.

It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. And in such cases, every intendment should be favorable to a purchaser at a judicial sale. But the rights of all parties must be regarded. No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of the law prescribed by the legislature for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void.

If this test be applied to the proceedings before us, we think in no just and legal sense can they be held to subject lot number 7 to the decree of the court, nor to fix any personal liability on the defendants, and, consequently, that the levy and sale of the sheriff were without authority and void, and the second question certified to this court must be so answered.

WINDSOR v. McVEIGH.

(3 Otto, 274-284. 1876.)

ERROR to the Corporation Court of the City of Alexandria, Virginia.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This was an action of ejectment to recover certain real property in the city of Alexandria, in the state of Virginia. It was brought in the corporation court of that city, and a writ of error from the court of appeals of the state to review the judgment obtained having been refused, the case was brought here directly by a writ of error from this court. Authority for this mode of procedure will be found stated in the case of *Gregory v. McVeigh*, 23 Wall., 294.

The plaintiff in the corporation court proved title in himself to the premises in controversy, and consequent right to their immediate possession, unless his life estate in them had been divested by a sale under a decree of condemnation rendered in March, 1864, by the district court of the United States for the eastern district of Virginia, upon proceedings for their confiscation. The defendant relied upon the deed to his grantor executed by the marshal of the district upon such sale. The proceedings mentioned were instituted under the act

of congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

In July, 1863, the premises in controversy were seized by the marshal of the district, by order of the district attorney, acting under instructions from the attorney-general. In August following, a libel of information against the property was filed in the name of the United States, setting forth that the plaintiff in this case was the owner of the property in question; that he had, since the passage of the above act, held an office of honor and trust under the government of the so-called Confederate States, and in various ways had given aid and comfort to the rebellion; that the property had been seized in pursuance of the act in compliance with instructions from the attorney-general, and, by reason of the premises, was forfeited to the United States, and should be condemned. It closed with a prayer that process of monition might issue against the owner or owners of the property and all persons interested or claiming an interest therein, warning them at some early day "to appear and answer" the libel; and, as the owner of the property was a non-resident and absent, that an order of publication in the usual form be also made. Upon this libel the district judge ordered process of monition to issue as prayed, and designated a day and place for the trial of the cause, and that notice of the same, with the substance of the libel, should be given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of monition and notice were accordingly issued and published. Both described the land and mentioned its seizure, and named the day and place fixed for the trial. The monition stated that at the trial all persons interested in the land, or claiming an interest, might "appear and make their allegations in that behalf." The notice warned all persons to appear at the trial, "to show cause why condemnation should not be decreed, and to intervene for their interest."

The owner of the property, in response to the monition and notice, appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently, on the 10th of March, 1864, the district attorney moved that the claim and answer and the appearance of the respondent by counsel be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines, and a rebel." On the same day the motion was granted, and the claim and answer ordered to be stricken from the files. The appearance of the respondent was by his answer. The court immediately entered its sentence and decree, condemning the property as forfeited to the United States, reciting that the usual proclamation having been made, the default of all persons had been duly entered. The decree ordered the issue of a *venditioni exponas* for the sale of the property, returnable on the 16th day of the following April. At the sale under this writ the grantor of the defendant became the purchaser.

The question for determination is, whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded.

§ 516. *A judgment rendered against a party without permitting him to be heard is wholly extrajudicial and void.*

There were several libels of information filed against the property of the plaintiff at the same time with the one here mentioned. They were identical in their allegations, except as to the property seized, and the same motion to strike from the files the appearance, claim and answer of the respondent was made in each case and on the same day, and similar orders were entered and like decrees of condemnation. One of these was brought here and is reported in the 11th of Wallace. In delivering the unanimous opinion of this court, upon reversing the decree in the case, and referring to the order striking out the claim and answer, Mr. Justice Swayne said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." 11 Wall., 267.

The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

§ 517. *A notice to appear becomes nugatory upon the denial of the right so to do.*

That there must be a notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be

not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether.

§ 518. *The jurisdiction acquired in proceedings in rem by seizure of the res is not to condemn without further proceedings.*

The position of the defendant's counsel is that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.

These views find corroboration in the opinion of Mr. Justice Story in the case of *Bradstreet v. Neptune Insurance Co.*, 3 Sumn., 601. In that case the action was upon a policy of insurance upon a vessel, the declaration alleging its loss by seizure of the Mexican government. The defendants admitted the seizure, but averred that it was made and that the vessel was condemned for violation of the revenue laws of Mexico, and to prove the averment produced a transcript of the record of the proceedings of the Mexican court against the vessel, and of the decree of condemnation. Among the questions considered by the court was the effect of that record as proof of the laws of Mexico and of the jurisdiction of the court, and the cause of seizure and condemnation. After stating that the sentence of a foreign court of admiralty and prize *in rem* was in general conclusive, not only in respect to the parties in interest, but also for collateral purposes and in collateral suits, as to the direct matter of title and property in judgment, and as to the facts on which the tribunal pro-

fessed to proceed, Mr. Justice Story said that it did not strike him that any sound distinction could be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*; that in each the sentence was conclusive as to the title and property, and, it seemed to him, was equally conclusive as to the facts on which the sentence professed to be founded. But the learned judge added that it was an essential ingredient in every case, when such effect was sought to be given to the sentence, that there should have been proper judicial proceedings upon which to found the decree; that is, that there should have been some certain written allegations of the offense, or statement of the charge for which the seizure was made, and upon which the forfeiture was sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, might know what the offense was with which they were charged, and might have an opportunity to defend themselves and to disprove the same. "It is a rule," said the learned judge, "founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or for its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party — *castigatque, auditque*. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding."

In another part of the same opinion the judge characterized such sentences "as mere mockeries, and as in no just sense judicial proceedings;" and declared that they "ought to be deemed, both *ex directo in rem* and collaterally, to be mere arbitrary edicts or substantial frauds."

This language, it is true, is used with respect to proceedings *in rem* of a foreign court, but it is equally applicable and pertinent in proceedings *in rem* of a domestic court, when they are taken without any monition or public notice to the parties. In *Woodruff v. Taylor*, 20 Vt., 65, the subject of proceedings *in rem* in our courts is elaborately considered by the supreme court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed that in every court and in all countries where judgments were respected, notice of some kind was given,

and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment *in personam*. "A proceeding," continued the court, "professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

In the proceedings before the district court in the confiscation case, monition and notice, as already stated, were issued and published; but the appearance of the owner, for which they called, having been refused, the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. His position with reference to subsequent proceedings was then not unlike that of a party in a personal action, after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld.

§ 519. *No court can exercise jurisdiction without first properly acquiring it.*

The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. *Norton v. Meador*, Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, to the same purport, in the case of *Ex parte Lange*, 18 Wall., 163. So it was held by this court in *Bigelow v. Forrest*, 9 id., 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached

collaterally; but, under the act of congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction." *Id.*, 350.

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity, upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornett v. Williams*, 20 Wall., 250, is more accurate. "The jurisdiction," says the justice, "having attached in the case, every thing done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud."

It was not within the power of the jurisdiction of the district court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.

Judgment affirmed.

JUSTICES MILLER, BRADLEY and HUNT dissented.

§ 520. **Foreign discharge in bankruptcy.**—When a suit is brought in a circuit court of the United States on a contract made in a foreign state, and a plea of discharge in bankruptcy in that state is set up, the plea is bad; for, so far as it attempts to discharge the contract, it is void as impairing the obligation of contracts, while so far as it discharges the person, estate or effects of the debtor it is part of the law of the remedy, and therefore does not apply when suit is brought in another state. *Hinkley v. Marean*, 3 Mason, 90.

§ 521. Disabilities to sue affect the party only in the country imposing them. They do not, like natural defects, adhere to the person and pass with it to distant regions, but fall off when he travels out of the jurisdiction which has imposed them. Therefore, held, that an action brought by the assignees in bankruptcy of the obligee of a bond in the name of the obligor, in the circuit court of the United States, might be maintained although the obligor was a British subject, resident in England, and had there gone into bankruptcy, by which process all his rights became vested in his assignees. *Blane v. Drummond*, 1 Marsh., 69.

§ 522. **Void judgments.**—A decision of a register and receiver of the land office, granting a pre-emption in land in which the law declares pre-emptions shall not be granted, is beyond the jurisdiction of the land office and is void. *Wilcox v. Jackson*, 13 Pet., 511.

§ 523. The judgment of the county court of a state is conclusive in courts of the United States, unless given on a matter on which the court has no jurisdiction. If on such matter, it is a nullity. *Elliott v. Peirsol*, 1 Pet., 340.

§ 524. A decree of a court upon a subject-matter over which it has no jurisdiction is void, and may be treated as of no validity when it is used in collateral proceedings. *Hickey v. Stewart*, 3 How., 760.

§ 525. Certain real estate in Georgia was sold during the war under partition proceedings in the state court. At the time one of the devisees, holding a vested remainder, was serving as a surgeon in the United States army. Held, that this court had jurisdiction of a bill for partition by said devisee, the proceedings in the state court being void. *Cuyler v. Ferrill*, 1 Abb., 169.

§ 526. **Remedy against void judgments.**—Although judgments confessed in a state court in violation of the bankrupt law are void, yet, as the judgment of a court having jurisdiction of the parties and subject-matter in controversy is binding upon every other court until it is regularly reversed, although founded upon an erroneous view of the matter in controversy, the United States courts cannot investigate the validity of the proceedings in a state court which had jurisdiction of the subject-matter, and the remedy against such judgments as may be in violation of the bankrupt law must be sought in the tribunals from which they issued. *Atkinson v. Purdy*, Crabbe, 551.

§ 526a. **Judgment of state court.**—In a suit in the federal court on a judgment of a state court, the court ruled as follows: “The subject-matter of the suit in the state court was a note which by the judgment became merged in the higher security. In this court the subject of the suit was a judgment, which was conclusive evidence of a debt due the plaintiffs, who, being citizens of New York, have a right to sue in this court on any cause of action within its cognizance. We cannot discriminate between a debt due by judgment, or in any other way; an action of debt on a judgment is not like a *scire facias*, which must issue from the same court which rendered the judgment.” *Barr v. Simpson*, Bald., 543.

§ 527. **Judgment of Spanish court in Louisiana.**—The adjudication of a competent Spanish tribunal, having jurisdiction of the case, made in Louisiana after the cession of that territory to the United States, but before possession surrendered, and while the country was still subject to Spanish laws, is valid so far as it affects the private rights of parties thereto. *Keene v. M'Donough*, * 8 Pet., 308.

§ 528. **A judgment of a Louisiana court, during the war of the rebellion, by which a citizen of New Orleans, who had been expelled by military authority into the Confederate lines, was deprived of his property without giving him a day in court, is wholly null.** *Lasere v. Rochereau*, * 17 Wall., 437.

§ 529. **Decision of special tribunal.**—When the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal within the scope of its authority is binding upon all parties. *Rector v. Gibbons*, 2 McC., 286.

§ 530. **The decision of the Arkansas land commission is a final adjudication and not subject to a review by the circuit court of the United States.** *Ibid.*

§ 531. **Decisions of state court not subject to review.**—A bill was filed in the circuit court for Louisiana, setting forth certain proceedings in the state court under which a sale of real property was made. The bill alleged that the whole transaction was a fraud on the complainant; that the clerk of the state court was a party to the fraud, and that complainant was greatly damaged. *Held*, that as the state court was a court of general jurisdiction, its judgments and decrees were not subject to revision by the federal court. *Nougué v. Clapp*, * 11 Otto, 551.

§ 532. **Where a state court of probate has passed upon the validity of a will, a federal court will not review that decision.** *Piatt v. McCullough*, 1 McL., 73.

§ 533. **When a state court possessing jurisdiction of the subject-matter of a suit before it, e. g., a settlement of an estate or the probate of a will in a probate court, renders a decree in the suit, this decree will not be reviewed nor will its enforcement be enjoined by the circuit court of the United States.** *Freeney v. First Nat. Bank of Plattsburgh*, 3 McC., 625.

§ 534. **The decree of a probate court is decisive on the validity of a will to pass the title to real estate in the federal courts.** *Tompkins v. Tompkins*, 1 Story, 552.

§ 535. **The federal courts have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is given as conclusive of the contents and validity of a will.** *Fouvergne v. New Orleans*, 18 How., 470.

§ 536. **Inquiry as to jurisdiction of state court.**—The circuit court of the United States can examine whether a state court which has rendered a judgment had jurisdiction of the case in which it gave judgment, but cannot examine whether the judgment is erroneous or not. *Sprague v. Litherberry*, 4 McL., 450.

§ 537. **In pleading, if a judgment of a court of general jurisdiction is shown as a bar to the action, it is presumed to have had jurisdiction of the subject-matter; but if the court investigate the question it will take judicial notice of the public laws of the state, the constitution and jurisdiction of the various courts of general jurisdiction.** *Pennington v. Gibson*, 16 How., 74.

§ 538. **When a judgment of a neighboring state is offered in evidence in a federal court, the court can inquire into the jurisdiction of the state court as to subject-matter and parties, but only so far as these are not alleged in the record. If it appears from the record that the court had no jurisdiction over the person of the defendant, the judgment will be disregarded.** *Lincoln v. Tower*, 2 McL., 486; *Westerwelt v. Lewis*, id., 512; *Thompson v. Emmert*, 4 McL., 97.

§ 539. **Concurrent jurisdiction.**—When a question has been adjudicated upon by a state court having jurisdiction of the subject-matter, a federal court having concurrent jurisdic-

tion of the subject-matter will not interfere, if there is no fraud or collusion in the judgment. *Chaffin v. St. Louis*, 4 Dill., 28.

§ 540. **Jurisdiction of state court must appear.**—When a state court is acting under a special and limited jurisdiction, it must appear upon the record that it has complied with all the requirements necessary to give it jurisdiction, or the federal courts will not consider its acts binding upon them. *Mayhew v. Davis*, 4 McL., 223.

§ 541. **Record not showing jurisdiction.**—If a circuit court of the United States renders a decree in equity, and the record does not show the jurisdiction of the court to render such a decree, the decree, though erroneous, is not a nullity, but must stand till reversed. *Kennedy v. Bank of Georgia*, 8 How., 611.

§ 542. **Want of service of process.**—Service of process or notice is necessary to enable a court to exercise jurisdiction in a case, and if jurisdiction be taken where there has been no service of process or notice, the proceeding is a nullity, and absolutely void. But this is only where original jurisdiction is exercised, and not a decision of a collateral question in a case where the parties are before the court, *e. g.*, an amendment. *Walden v. Craig*, 14 Pet., 154.

§ 543. A judgment of a state court is valid in a United States court, only if the state court had proper jurisdiction of the case. If judgment was rendered without notice to the defendant or appearance by him, the judgment is void. *Warren Manuf. Co. v. Etna Ins. Co.*, 3 Paine, 503.

§ 544. **A decree of dismissal of a suit in equity in the district court is a bar to a bill in equity on the same cause of action**, although the pleadings do not show in the district court that the parties are citizens of different states, for the decree of the district court, though erroneous, is not a nullity, but remains in force till reversed. *McCormick v. Sullivant*, 10 Wheat., 198.

§ 545. **Decree in admiralty.**—When suit is brought in one district court in admiralty, to enforce a decree in admiralty in another district court, the decree is conclusive, and can only be attacked for want of jurisdiction or fraud, not for error or irregularity. *Otis v. The Rio Grande*, 1 Woods, 280.

§ 546. **Divorce.**—When a court of divorce has given a judgment, after due notice to the defendant, in a case of which the jurisdiction appears on the record, this judgment is binding in all other jurisdictions. If it is reversible for error, it is reversible only in the court in which it was rendered, and the circuit court of the United States will not question its validity. *Amory v. Amory*, 3 Biss., 270.

§ 547. **Where a sale was made under a decree of court, and subsequently on appeal from the decree it appeared that the court had not jurisdiction, the sale is invalid and cannot be supported, when attacked collaterally, by the record, because the record includes the proceedings on appeal.** *Galpin v. Page*,* 18 Wall., 350.

§ 548. **The presumptions in favor of jurisdiction indulged in favor of courts of general jurisdiction arise only as to facts concerning which the record is silent, and are limited to jurisdiction over persons within the territorial limits of the court, or within reach of its process.** Hence where there is service by publication, strict compliance with the necessary forms must appear on the record. Service by publication is not a common law power, even of courts of general jurisdiction; hence the essential jurisdictional facts must appear on the record. *Ibid.*

§ 549. **Presumption as to regularity.**—Where the question was whether foreclosure proceedings had been carried through the proper court, and the original papers constituting the record were lost, but evidence of the decree of foreclosure was given, as also of the other steps of the proceedings, the jury were instructed that the court was of general jurisdiction, and from the rendering of the decree, the regularity of the other proceedings was presumed, though the presumption might be rebutted. *Smith v. Pomeroy*,* 2 Dill., 414.

§ 550. **Presumption — Attachment.**—When a judgment is used in a collateral proceeding, if it was rendered by a court of general jurisdiction, it will be presumed to be within that jurisdiction. The fact that an affidavit upon which an attachment was issued was not copied into the record will not invalidate the judgment. *Biggs v. Blue*, 5 McL., 149.

§ 551. **Decisions not judicial.**—The secretary of war has power to appoint a board of commissioners to hear and decide upon claims in a military district. The decisions of these commissioners are not judicial and the claimants may present their claims before any proper court. *United States v. Adams*, 7 Wall., 463.

§ 552. **Decree against land in another state.**—A court of one state may, if the proper parties are before it, make a valid decree affecting land in another state, and enforce it *in personam*; but such decree has no validity outside the jurisdiction in which it is made. *Watts v. Waddle*, 6 Pet., 397.

§ 553. **Illegal transaction.**—Investing money in the bonds of the Confederate States is an act giving aid and comfort to the enemies of the United States; and no state legislation, no

act of its convention, no judgment of its tribunals, and no decree of the Confederate government, can make such a transaction lawful. Hence it is no answer to a bill against an executor for an account, that the party invested funds which came into his hands as executor in bonds of the Confederate States, and that by the decree of the probate court this investment was approved, and he directed to pay the legatees their respective shares in those bonds. *Horn v. Lockhart*, 17 Wall., 570.

§ 554. **Failure to object.**— If the assignees of a bankrupt mortgagor, in a suit for the distribution of the surplus arising from the foreclosure of a mortgage under a state law, appear in the state court, submit to its jurisdiction, and take the chance of a decision in their favor, without objecting to its jurisdiction, they cannot raise that question, after a decision against them, on appeal to this court. The question having been *prima facie* within the jurisdiction and control of the state court, the objection, to be heard here, should have been raised there. *Mays v. Tritton*, 20 Wall., 414.

§ 555. **Where a party has lost his right to prosecute.**— The fact that a party has lost the opportunity of prosecuting his rights in the probate court, through not hearing of the proceedings then pending, on account of living in a secluded portion of the world, there having been no concealment nor fraud in connection with those proceedings, will not entitle such party to relief in equity. *Case of Broderick's Will*, 21 Wall., 503.

§ 556. **Collateral attack.**— Where the jurisdiction of a state court is unquestionable, and it has rendered a judgment, this judgment cannot be attacked collaterally in a proceeding in the circuit court of the United States. *Forsythe v. Ballance*, 6 McL., 567.

§ 557. A judgment of a state court may be impeached in a collateral proceeding in a federal court on the ground of lack of jurisdiction, and, for this purpose, allegations in the record showing *prima facie* facts sufficient to give jurisdiction may be shown to be false. *Thompson v. Whitman*, 18 Wall., 469.

§ 558. A judgment rendered without due notice to a defendant may be impeached collaterally; but a judgment which is rendered by a court of limited jurisdiction, and which does not on its face show the jurisdiction, though reversible for error, is not a nullity. *Farmers' Loan and Trust Co. v. McKinney*, 6 McL., 11.

§ 559. When a state court, having jurisdiction of the subject-matter and of the parties to a case, makes a decree ordering and confirming a judicial sale of property, this decree is conclusive in a collateral proceeding in a federal court. *Jeter v. Hewitt*, 23 How., 352.

§ 560. When a judgment of a court of superior jurisdiction is attacked collaterally for want of jurisdiction, it is not enough that the record does not show that the court had jurisdiction, but it must show that the court had not jurisdiction. *Galpin v. Page*, 1 Saw., 319.

§ 561. The decision of a state court, having jurisdiction of the parties and subject-matter of a case before it, is conclusive as to the regularity of the proceedings when the decision is brought in question in a collateral proceeding in a federal court. *Cornett v. Williams*, 20 Wall., 249.

§ 562. The decree of any state court may be impeached collaterally in a federal court for fraud. *Rhoades v. Selin*, 4 Wash., 721.

§ 563. When the jurisdiction of a court has once attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. Hence the purchaser at an administrator's sale, under a decree of the court, if the preliminary proceedings to give the court jurisdiction are correct, need not look beyond the decree. *McNitt v. Turner*, 16 Wall., 352.

§ 564. The decision of the land commission, upon claims founded on Mexican grants in California, is final as between the United States and the claimant, if the case was a proper one for the commission. *Lynch v. Bernal*, 9 Wall., 321.

§ 565. Where the jurisdiction of a state court to make a decree for partition of land appears on the record, the decree will not be impeached collaterally in the supreme court of the United States. *Secrist v. Green*, 3 Wall., 751.

§ 566. When it appears that the land commissioners appointed to settle private titles to land in California had jurisdiction of a claim brought before them, their decision will not be questioned collaterally in the supreme court of the United States. *Beard v. Federy*, 3 Wall., 489.

§ 567. When a sale of land on execution, attached on mesne process, is a step in the title of a claimant, the sale cannot be attacked collaterally except on the point of jurisdiction. The essentials of jurisdiction in such a case are, 1, the levy of the writ of attachment on the land in the manner prescribed by law. 2. If the defendant is a non-resident or absent, the publication of notice in the manner prescribed by law. If these requisites are complied with, the supreme court of the United States will not, in a collateral proceeding, inquire into errors in the proceedings subsequent to the taking of the property by attachment. *Cooper v. Reynolds*, 10 Wall., 315.

4. *Affected by State Laws, Remedies and Practice.*

SUMMARY — *Causes of action peculiar to a state may be enforced in federal courts, § 568.— Suit in federal court under statute requiring suit in state court, § 569.— Cause of action in federal court not invalidated by state insolvency laws, § 570.— State statute enforced by federal court, § 571.— Common law including statute law, § 572.— Suit upon judgment of state court in face of statute, § 573.— Partition, § 574.— Federal rules of decision in law and equity, §§ 575-579.— Equity, § 580.*

§ 568. A liability arising from the common law or statutes of a particular state may be enforced in any United States circuit court having jurisdiction of the parties. *Dennick v. Railroad Co.*, §§ 581-584.

§ 569. Where a state statute gives a general right to recover damages for a death resulting from the negligence of a person or corporation, the federal courts may enforce such right, without regard to a proviso in the statute that the action shall be brought in a state court. *Railway Co. v. Whitton*, §§ 585-588.

§ 570. Where a non-resident plaintiff brought a suit in a state court, which suit was afterwards, in accordance with state law, homologated with insolvency proceedings against the defendant in another state court, the plaintiff was not thus precluded from suing on the same cause of action in a federal court. *Hyde v. Stone*, §§ 589-591.

§ 571. A cause of action against a town on account of a defective highway, though created by state statute, may be enforced in the federal court. *Keith v. Rockingham*, § 592.

§ 572. The judiciary act, in conferring jurisdiction upon the federal courts in suits at common law, means common law as distinguished from equity, not as distinguished from statute law. *Ibid.*

§ 573. A statute of Iowa forbidding the bringing of an action upon any judgment rendered by a court of that state without obtaining leave of such court is without effect in the federal court of the district. *Phelps v. O'Brien County*, § 593.

§ 574. The federal court in a proper case has jurisdiction to entertain a petition for partition, though this is a statute remedy, and is confined by the terms of the statute to the courts of the state. *Ex parte Biddle*, §§ 594, 595.

§ 575. The federal courts find their rules of decision in the local law, but derive their powers in general from the constitution and laws of the United States. *Lorman v. Clarke*, §§ 596-603.

§ 576. The federal courts, being endowed with general equity powers, may enforce equitable rights however originating. *Ibid.*

§ 577. A statute of Michigan having given to creditors an equitable right to subject the debtor's property to the payment of his debts, the federal courts have power to enforce this right. *Ibid.*

§ 578. The state laws are rules of decision to the federal courts in trials at common law, but this does not apply when they sit as courts of equity. They then are governed by the general principles of equity jurisprudence. *Burt v. Keyes*, §§ 604-610.

§ 579. Though an Ohio statute declares that a fraudulent sale of property shall inure to the benefit of all creditors equally, the federal court sitting in equity, having obtained jurisdiction of the subject-matter, may declare the sale void, and proceed to give the complainant a judgment lien for the whole amount of his claim. *Ibid.*

§ 580. The equity jurisdiction of the federal courts is wholly derived from the constitution and laws, is the same in all the states, and is unaffected by state statutes. *Strettell v. Ballou*, §§ 611, 612.

[NOTES.— See §§ 613-627.]

DENNICK v. RAILROAD COMPANY.

(13 Otto, 11-21. 1880.)

ERROR to U. S. Circuit Court, Northern District of New York.

STATEMENT OF FACTS.— Action by an administratrix to recover damages for the negligence of defendant resulting in the death of the intestate. The letters of administration were granted in New York, and this suit was originally brought in a state court of that state, but was removed into the circuit court of the United States at the instance of defendant. The answer denied the negligence but admitted the killing, which took place in New Jersey. In the

court below it was held that as the cause of action is based on a special statute of New Jersey, the plaintiff could not recover in this action.

Opinion by MR. JUSTICE MILLER.

It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages which, under the statute of New Jersey, is imposed upon a party, by whose wrongful act, neglect or default death ensues, can be enforced by no one but an administrator or other personal representative of the deceased, appointed by the authority of that state. And the soundness or unsoundness of this proposition is what we are called upon to decide. It must be taken as established by the record that the accident by which the plaintiff's husband came to his death occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death.

§ 581. *A liability arising under the statutes of one state may be enforced by the courts of another.*

It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the circuit court of the United States for the northern district were competent to try such a case when the parties were properly before it. *Mostyn v. Fabrigas*, 1 Cowp., 161; *Rafael v. Verelst*, 2 W. Bl., 983, 1055; *McKenna v. Fisk*, 1 How., 241. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. (N. Y.), 614;

Lowry v. Inman, 46 N. Y., 119; Pickering v. Fisk, 6 Vt., 102; Railroad v. Sprayberry, 8 Bax. (Tenn.), 341; Great Western Railway Co. v. Miller, 19 Mich., 305.

§ 582. *Construction of a statute of New Jersey.*

But it is said that, conceding that the statute of the state of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction. The statute does not say this in terms. "Every such action shall be brought by and in the names of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, "if they reside in the state of New Jersey?" It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the state?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing that there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one state, suing in that character in the courts of another state, without any authority from the latter. It is the general rule that this cannot be done. The suit here was brought by the administratrix in a court of the state which had appointed her, and of course no such objection could be made.

§ 583. *A suit may be brought in the United States circuit court by a New York administratrix upon a cause of action arising under a New Jersey statute.*

If, then, the defendant was liable to be sued in the courts of the state of New York on this cause of action, and the suit could only be brought by such personal representative of the deceased, and if the plaintiff is the personal representative, whom the courts of that state are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey statute. But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having

control of her can compel distribution of the amount received in the manner prescribed by that statute.

Again, it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his life-time. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as specific property devised to individuals, or the amount which by the legislation of most of the states is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator, clothed with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that state would be held to have recovered to the same uses, and subject to the remedies in his fiduciary character which both statutes prescribe.

§ 584. — *contrary authorities.*

We are aware that *Woodward v. Michigan Southern & Northern Indiana Railroad Co.*, 10 Ohio St., 121, asserts a different doctrine, and that it has been followed by *Richardson v. New York Central Railroad Co.*, 98 Mass., 85, and *McCarthy v. Chicago, Rock Island & Pacific Railroad Co.*, 18 Kan., 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the court of appeals of New York, in the case of *Leonard, Administrator, v. The Columbia Steam Navigation Co.*, not yet reported, but of which we have been furnished with a certified copy. The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different states. The questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action. Judgment reversed, with directions to award a new trial.

RAILWAY COMPANY *v.* WHITTON.

(13 Wallace, 270-291. 1871.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

STATEMENT OF FACTS.—Mrs. Whitton was run over by a railway train in Wisconsin, and killed. Her husband, as her administrator in Wisconsin, sued the company in a state court under a statute of that state allowing damages limited to \$5,000 to the surviving relatives of persons killed by negligence, etc. After the suit was brought the act of congress of March 2, 1867, was passed, and under it Whitton removed the cause into the court for the eastern district of Wisconsin, in which he recovered a judgment. The railroad company brought up the case by writ of error.

Opinion by MR. JUSTICE FIELD.

The jurisdiction of the action by the federal court is denied on three grounds: The character of the parties as supposed citizens of the same state; the limitation to the state court of the remedy given by the statute of Wisconsin; and the alleged invalidity of the act of congress of March 2, 1867, under which the removal from the state court was made.

§ 585. *For the purposes of an action at law a corporation is a citizen of the state which created it.*

First, as to the character of the parties. The plaintiff is a citizen of the state of Illinois, and the defendant is a corporation created under the laws of Wisconsin. Although a corporation, being an artificial body created by legislative power, is not a citizen within several provisions of the constitution, yet it has been held, and that must now be regarded as settled law, that, where rights of action are to be enforced, it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states. *Paul v. Virginia*, 8 Wall., 177. The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such, a citizen of Wisconsin by the laws of that state. It is not *there* a corporation or a citizen of any other state. Being there sued it can only be brought into court as a citizen of that state, whatever its *status* or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *The Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 286 (§§ 1351-52, *infra*). In that case the declaration averred that the plaintiffs were a corporation created by the laws of the states of Indiana and Ohio, and that the defendant was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the state which created it, and therefore that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against a citizen of the latter state, and of course could not be maintained in a court of the United States where jurisdiction of the case depended upon the citizenship of the parties. The court also observed that though a corporation by the name and style of the plaintiffs in that case appeared to have been chartered by the states of Ohio and Indiana, clothed with the same capacities and powers, and

intended to accomplish the same objects, and was spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states, yet it had no legal existence in either state except by the law of that state; that neither state could confer on it a corporate existence in the other nor add to or diminish the powers to be there exercised, and that though composed of and representing under the corporate name the same natural persons, its legal entity, which existed by force of law, could have no existence beyond the territory of the state or sovereignty which brought it into life and endowed it with its faculties and powers.

The correctness of this view is also confirmed by the recent decision of this court in the case of *The Railroad Company v. Harris*, 12 Wall., 65. In that case a Maryland railroad corporation was empowered by the legislature of Virginia to construct its road through that state, and by an act of congress to extend a lateral road into the District of Columbia. By the act of Virginia the company was granted the same rights and privileges in that state which it possessed in Maryland, and it was made subject to similar pains, penalties and obligations. By the act of congress the company was authorized to exercise in the District of Columbia the same powers, rights and privileges in the extension and construction of the road, as in the construction and extension of any railroad in Maryland, and was granted the same rights, benefits and immunities in the use of the road which were provided in its charter, except the right to construct from its road another lateral road. And this court held that these acts did not create a new corporation either in Virginia or the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that state and District. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations and made it subject to suit in Virginia and in the District. The corporation, said the court, "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly. For the purposes of federal jurisdiction it is regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted."

§ 586. *The federal courts have power to enforce a general right given by the statutes of a state, and their jurisdiction in such case is not subject to state limitations.*

Second, as to the limitation to the state court of the remedy given by the statute of Wisconsin. That statute, after declaring a liability by a person or a corporation to an action for damages when death ensues from a wrongful act, neglect or default of such person or corporation, contains a proviso "that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." This proviso is considered by the counsel of the defendant as in the nature of a condition, upon a compliance with which the remedy given by the statute can only be enforced.

It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the state. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the limits of the state. But when death does thus ensue from any of those causes the relatives of the deceased named in the statute can maintain an action for damages. The lia-

bility within the conditions specified extends to all parties through whose wrongful acts, neglect or default, death ensues, and the right of action for damages occasioned thereby is possessed by all persons within the description designated. In all cases, where a general right is thus conferred, it can be enforced in any federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. The statutes of nearly every state provide for the institution of numerous suits, such as for partition, foreclosure and the recovery of real property in particular courts and in the counties where the land is situated; yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation.

This doctrine has been asserted in several cases by this court. In *Suydam v. Broadnax*, 14 Pet., 67, an act of the legislature of Alabama provided that the estate of a deceased person, declared to be insolvent, should be distributed by the executors or administrators according to the provisions of the act, and that no suit or action should be commenced or sustained against any executor or administrator after the estate had been declared to be insolvent, except in certain cases; but this court held, in a case not thus excepted, that the insolvency of the estate, judicially declared under the act, was not sufficient in law to abate a suit instituted in the circuit court of the United States by a citizen of another state against the representatives of a citizen of Alabama. "The eleventh section of the act to establish the judicial courts of the United States," said the court, "carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States, and gives to the circuit court 'original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law and in equity,' etc., etc. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court."

In the *Union Bank of Tennessee v. Jolly*, 18 How., 506, this court declared that the law of a state "limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there to which they may be legally or equitably entitled." The same doctrine was affirmed in *Hyde v. Stone*, 20 How., 170 (§§ 589-591, *infra*), and in *Payne v. Hook*, 7 Wall., 425.

§ 587. *The act of March 2, 1867, authorizing suits to be removed from a state to a federal court on the ground of prejudice, etc., is constitutional and valid.*

Third, as to the alleged invalidity of the act of March 2, 1867, under which the removal from the state court was made. The counsel of the defendant, whilst confining his special objection to this act, questions the soundness of the reasoning of Mr. Justice Story, by which any legislation for the removal of causes from a state court to a federal court is maintained. We may doubt, with coun-

sel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the federal court acquires original jurisdiction of the causes. *Dennistoun v. Draper*, 5 Blatch., 340. But it is not material whether the reasoning of the distinguished jurist in this particular is correct or otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the judiciary act of 1789.

The judicial power of the United States extends by the constitution to controversies between citizens of different states as well as to cases arising under the constitution, treaties and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the constitution, are mere matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all state authority; in other cases it may be made so at the option of congress, or it may be exercised concurrently with that of the states. Such was the opinion of Mr. Justice Story, as expressed in *Martin v. Hunter*, 1 Wheat., 334, and this conclusion was adopted and approved by this court in the recent case of *The Moses Taylor*, 4 Wall., 429. The legislation of congress has proceeded upon the correctness of this position in the distribution of jurisdiction to the federal courts. The judiciary act of 1789, as observed in the case of *The Moses Taylor*, declares "that in some cases from their commencement such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed from their commencement exclusively under the cognizance of the federal courts. On the other hand, some cases in which an alien or a citizen of another state is made a party may be brought either in a federal or a state court at the option of the plaintiff, and if brought in the state court may be prosecuted until the appearance of the defendant, and then at his option may be suffered to remain there or may be transferred to the jurisdiction of the federal courts. Other cases, not included under these heads, but involving questions under the constitution, laws, treaties or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error after final judgment. By subsequent legislation of congress, and particularly by the legislation of the last four years, many of the cases which by the judiciary act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages upon the application of the defendant. The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both state and federal courts."

When the jurisdiction of the federal court depended upon the citizenship of the parties, the case could not be withdrawn from the state courts after suit commenced until the passage of the act of 1867, except upon the application of the defendant. The provision of the constitution extending the judicial power of the United States to controversies between citizens of different states had its existence in the impression that state attachments and state prejudices might affect injuriously the regular administration of justice in the state courts. The protection intended against these influences to non-residents of a state was

originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a state court a like election to the defendant afterwards. The time at which the non-resident party should be allowed thus to make his election was evidently a mere matter of legislative discretion, a simple question of expediency. If congress has subsequently become satisfied that where a plaintiff discovers, after suit brought in a state court, that the prejudice and local influence, against which the constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be permitted to remove his case into a national court, it is not perceived that any constitutional objection exists to its authorizing the removal, and, of course, to prescribing the conditions upon which the removal shall be allowed.

It follows, from the views we have expressed, that the objection to the jurisdiction of this action by the circuit court, upon the grounds advanced by the defendant, cannot be maintained.

§ 588. *It is not error for a trial court to refuse special and specific instructions when its general charge furnishes sufficient information to guide the deliberations of the jury.*

It only remains to say a few words upon the refusal of the court to give the instructions prayed by the defendant, and upon its ruling in the admission of certain evidence and its charge to the jury. The facts of the case are very few, and with respect to most of them there was little conflict of evidence. Upon these facts the court gave to the jury a clear and full charge upon the duties and responsibilities of the railroad company in crossing the street of the city with its engines and trains, and upon the care, prudence and caution which it was incumbent upon the deceased to exercise in crossing the tracks; and as to the damages which the jury were authorized to find in case they were satisfied that the employees of the company had been guilty of negligence, and that such negligence had caused the death of the deceased.

The counsel of the plaintiff had requested three special instructions to the jury, and the counsel of the defendant had requested nineteen special instructions. The court, however, declined to give any of them except as they were embraced in its general charge. Some of the instructions prayed by the defendant presented the law respecting the liability of the company correctly, and some of them were based upon an assumed condition of things which the evidence did not warrant. But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticism in particulars considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence. The propriety of the rulings of the court in this case is fully vindicated in its opinion on the motion for a new trial.

The evidence of the condition of the deceased, that she was *enceinte* at the time of the accident, could not materially have affected the jury in the estimation of the damages, after the clear and explicit charge of the court as to the character of the damages which only they were authorized to consider.

The other evidence in the case, to the admission of which objection was taken, was not material, and could not have influenced the result.

Judgment affirmed.

HYDE v. STONE.

(20 Howard, 170-176. 1857.)

ERROR to U. S. Circuit Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The defendant in error instituted his suit in the circuit court, as the indorsee of a bill of exchange, payable in Boston, of which the plaintiffs in error were drawers, payees and indorsers, and which bears date at New Orleans.

The defendants answered the petition, and averred that the plaintiff was a citizen of Louisiana, and the said bill of exchange a Louisiana contract, and governed by the law of that state. That the plaintiff resided in Louisiana when the defendants surrendered their property in insolvency, in the third district court of New Orleans, and to the proceedings therein the plaintiff became a party. That, subsequently thereto, the said plaintiff instituted a suit on the said bill of exchange in the fifth district court of that city, and, on an exception filed by the defendants, informing that court of those facts, the same was sustained, and the said suit was transferred to the third district court of New Orleans, and made part of the aforesaid insolvent proceedings therein; by which the right of plaintiff to have and maintain this action in the circuit court is barred, and the question has become *res judicata*. With this exception to the jurisdiction of the court, the defendants filed a general denial of their indebtedness to the plaintiff. The cause was submitted to the circuit court upon an agreed statement, and judgment was rendered for the plaintiff without the intervention of a jury.

From that statement it appears that the bill was duly protested for non-payment; and the notary in Boston certifies: "I sent notice of the non-payment to the drawers and first indorsers, requiring payment of them, by mail, to New Orleans, on the day of the protest." That the plaintiff has always been a citizen of Massachusetts; that his family resided there, and he had a commercial establishment there; that he is a partner in a commercial establishment at New Orleans, and generally spent a portion of the winter months in that city, and then returned to Massachusetts; and that this bill was purchased in the city of New Orleans, on his own account. It further appears that the plaintiff, before the commencement of this suit, sued the defendant in the fifth district court of New Orleans on this bill; that the defendant appeared and answered that the fifth district court had no jurisdiction, because the defendant had made a surrender of his property to his creditors in the third district court of New Orleans, which surrender had been accepted, and all proceedings stayed against him; and that the plaintiff was put upon his schedule as a creditor; and he prayed that the suit of the plaintiff be transferred and cumulated with the insolvency proceedings in the third district court in New Orleans; that thereupon the fifth district court, before the commencement of the present suit, decreed that the exception herein filed be maintained, and the costs paid out of the mass of the property surrendered. It further appears that the plaintiff performed no act to make himself a party to the proceedings in insolvency in the third district court, and that no notice of those proceedings had ever been served on him; but that the bill of exchange described in his petition was enumerated among his debts, and the firm of H. L. Stone & Co., of New Orleans, which was supposed to be the holder of the bill, was placed on the schedule among the other creditors of the insolvents.

The question whether a foreign bill of exchange, sold by a merchant in New Orleans to a person who has a commercial house there, but whose domicile is at the place where the bill is payable, and where he resided when the proceedings in insolvency were instituted, is affected by them when he does not make himself a party to those proceedings, is not involved in this case. The defendant did not plead the pendency of those proceedings, or the decree of the third district court, as a bar to the present suit, or afford any proper description of them to raise that question. The exception of the defendant is, that certain proceedings pending in the third district court were successfully pleaded in the fifth district court of New Orleans, as a cause for the removal of a suit commenced by the plaintiffs against the defendants in that court to the other, and that the decision of the fifth district court upon that plea ought to preclude the plaintiff from maintaining this suit in the circuit court of the United States.

§ 589. *The jurisdiction of federal courts cannot be impaired by state laws.*

But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly*, 18 How., 503.

It follows, therefore, that the decision of the fifth district court of New Orleans, transferring this suit, commenced by the plaintiff on his bill against the defendants in that court, and directing it to be cumulated with the proceedings in bankruptcy which were pending in another court of the state, did not disable the plaintiff from commencing a suit in the circuit court, nor can it form a proper declinatory exception to its jurisdiction.

§ 590. *Due protest and notice of dishonor of a bill may be proved by admissions of defendant.*

The plaintiffs in error object that the evidence before the circuit court did not authorize the court to infer that they had notice of the dishonor of their bill. The notary states that he sent a notice to them, at New Orleans, on the day that the protest was made. In addition to this evidence, it is shown that the bill, after its maturity, was enumerated among the debts of the plaintiff in error on the schedule that was returned to the third district court; and that they successfully pleaded their return to the prosecution of a suit by the defendant in error in another court. A plaintiff may prove, by admissions of a defendant, that all the steps necessary to charge him as an indorser or drawer of a bill of exchange have been taken. Proof of a direct or conditional promise to pay after a bill becomes due, or of a partial payment, or of an offer of a composition, or of an acknowledgment of his liability to pay the bill, has been held to be competent evidence to go to a jury, of a regular notice of the dishonor of a bill, and to warrant a jury in presuming that a regular notice had been given. *Thornton v. Wynn*, 12 Wheat., 183; *Rogers v. Stevens*, 2 Term R., 713; *Patterson v. Beecher*, 6 J. B. Moore, 319; *Campbell v. Webster*, 2 M. G. Sc., 253; *Union Bank v. Grimshaw*, 15 La., 321; 3 Mart., N. S., 318.

§ 591. *Where a question of fact is submitted to the court, the finding will not be reviewed on appeal.*

The effect of such evidence in the particular case must be determined by the jury, and their decision cannot be reviewed by an appellate court. In the present case the matter of fact was submitted to the circuit court, and its determination on this subject cannot form the ground of an exception here. Judgment affirmed.

KEITH v. TOWN OF ROCKINGHAM.

(Circuit Court for Vermont: 18 Blatchford, 246-248. 1880.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.— This is an action on the case, founded upon section 41, chapter 25, of the General Statutes of Vermont, which provides as follows: "If any special damage shall happen to any person, his team, carriage or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same in an action on the case, in any court proper to try the same." The plaintiff is alleged to be a citizen of Massachusetts, and the defendant is a town in Vermont. The defendant moves to dismiss for want of jurisdiction, because, as is argued, this is not an action at common law or in equity, of which jurisdiction is given to the circuit courts of the United States by section 629 of the Revised Statutes of the United States, and section 1 of the act of March 3, 1875, to determine the jurisdiction of the circuit courts of the United States (18 U. S. Stat. at Large, 470), but is an action founded wholly upon the statutes of the state, and a proceeding of which the state courts only can have jurisdiction. The cause has been heard upon this motion.

§ 592. *By "suits at common law," in the judiciary act, is meant suits at law as distinguished from suits in equity.*

The constitution of the United States extends the judicial power of the United States to controversies between citizens of different states. Art. 3, sec. 2. Under this section and the one next preceding, authorizing congress to ordain and establish courts, jurisdiction has been given to the circuit courts, by the statutes cited, of suits of a civil nature, at common law, in which there shall be a controversy between citizens of different states. The question is, whether this is an action at common law. The same expression is used in article 7 of the amendments to the constitution, where it is declared that, in suits at common law, the right of trial by jury shall be preserved. This expression has been held to mean there, all suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered, and to admiralty proceedings, and not merely suits which the common law recognized among its old and settled proceedings. *Parsons v. Bedford*, 3 Pet., 433. The right of recovery in this action is founded upon the statute, but an action at common law may be founded upon a statute. *Bac. Ab., Statute, K.* The rights to be determined are purely legal rights, as distinguished from equitable rights. The action on the case, given by the statute, is a common law action. The parties to it have the right to a trial by jury according to the course of the common law, which the legislature of the state cannot take away or abridge. *Plimpton v. Somerset*, 33 Vt., 283. This court has concurrent jurisdiction with the courts

of the state, of actions of this nature, in which there is a controversy between citizens of different states, of the required amount, as there is here, and, therefore, this is a proper court to try the action, within the meaning of the statute of the state giving the action. Motion overruled.

PHELPS *v.* O'BRIEN COUNTY.

(Circuit Court for Iowa: 2 Dillon, 518, 519. 1873.)

STATEMENT OF FACTS.—Action on a judgment rendered August 5, 1873, in favor of the assignor of plaintiff, against the county of O'Brien, in a state court of Iowa. Plaintiff is a citizen of Illinois. Defendant demurred on the ground that leave of the court to bring the suit was not asked.

Opinion by DILLON, J.

Section 2521 of the code of Iowa enacts: "No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of this state, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party, except in cases when the record of such judgment is, or shall be, lost or destroyed."

The eleventh section of the judiciary act provides that "the circuit court shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law . . . between a citizen of the state where the suit is brought and a citizen of another state."

§ 593. *State legislation cannot limit the jurisdiction of the courts of the United States.*

The case made in the petition falls within the jurisdiction of this court as thus prescribed, and this jurisdiction cannot be in any manner limited or affected by state legislation. But in cases at common law properly cognizable in this court, the laws of the several states, where applicable, form rules of decision here; as, for example, the limitation laws of the states are as available to a defendant in this court as in the state court where there is no act of congress to the contrary. It is our opinion that the section of the code (2521) above mentioned is, and must be, limited to suits in the state courts of the character therein contemplated. A person who has the right under the constitution and laws of the United States to bring his action in this court cannot be compelled first to obtain the leave of a state court. In principle this case is settled by several adjudications of the supreme court of the United States. *Railway Company v. Whitton*, 13 Wall., 270, 285 (§§ 585–588, *supra*); *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly*, 18 How., 506; *Payne v. Hook*, 7 Wall., 425.

Demurrer overruled.

LOVE, J., concurs.

EX PARTE BIDDLE.

(Circuit Court for Massachusetts: 2 Mason, 472–474. 1822.)

STATEMENT OF FACTS.—Petition for partition under a statute. Motion to dismiss for want of jurisdiction.

§ 594. *The federal court has jurisdiction in case of a petition for partition, a remedy created by state statutes and confined to state courts.*

Opinion by STORY, J.

The motion to dismiss this proceeding is founded upon the notion that a petition for partition is a statute remedy, which is confined by the terms of the

statutes to the state courts, and the argument is that, if so, it cannot be pursued in any other courts. It is certain that the statutes confine this remedy in terms to the state courts; and so they do all other remedies, for no state legislature can be presumed to legislate, as to remedies, except in its own courts. If the argument be well founded in this case, it will have a most material bearing upon the jurisdiction of the courts of the United States, and shut out parties who are entitled to sue from almost all the most useful remedies which the *lex loci* has provided for the protection of their rights. I have bestowed a good deal of reflection upon this subject, and am satisfied that parties entitled to sue in the courts of the United States are *in general* entitled to pursue in such courts all the remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts. It appears to me this is the necessary result of the general principles of law applicable to the organization of the courts of the United States. The process used in these courts is, in general, the same as in the state courts; and the laws of the states are expressly declared to be rules of decision in trials at common law in cases where they apply. And the same doctrine must have been held without this express provision, and must now be implied in all suits where the *lex loci* is to regulate the rights or remedies of parties. Infinite mischiefs would, upon any other principle, arise in the administration of justice; for there is scarcely a single right or remedy which has not been materially changed and modified by the state legislatures. The whole structure of our judicial establishment manifestly contemplates that in cases within the reach of their jurisdiction the courts of the United States are to administer the same remedial justice that would be administered in the proper state courts. The twelfth section of the judicial act of 1789, ch. 20, authorizes an alien, or a citizen of another state, who is sued in a state court, to remove the suit into the circuit court of the United States; and provides that "the cause shall there proceed in the same manner as if it had been brought there by original process." These terms certainly suppose that every suit instituted in a state court, which might be removed from it, might be originally commenced in the circuit court; yet such suit might be altogether founded on a statute remedy, provided for and limited in terms to the courts of the state. Such, in point of fact, was the case of *Wilson v. Mason*, 1 Cranch, 45, founded on a summary proceeding, under a *caveat*, which, by the express provision of the state laws, was limited to the state court. Yet, although the jurisdiction of the supreme court was assailed on another ground, no objection of this nature was made to the jurisdiction of the district court, into which the suit was removed from the state court; and if there had been any validity in the objection, in a cause so earnestly and ably contested, it is scarcely possible it should have escaped both the bar and the bench. If this petition had been brought by the respondents in a state court, the plaintiffs might certainly have removed it into the circuit court; and yet the very objection now urged would have applied as forcibly to that as to this case. It might then have been argued that the remedy was limited to the state courts, and could not be enforced elsewhere; and that the suit could not be brought into the circuit court by original process, and therefore could not be removed there. I do not perceive the slightest difference in principle between the cases. If the special nature of the remedy would not prevent the removal of the suit, neither would it prevent its being pursued originally in this court. In this view the case already cited seems to me an authority fully in point, in support of our jurisdiction.

§ 595. *An averment of belief as to the citizenship of defendant is an error cured by his appearance.*

There is another objection, however, which appears to me entitled to more weight. To sustain the jurisdiction of the court it is necessary that the suit should be between citizens of different states, or an alien should be a party. Here the petition states no adverse parties. It alleges that the adverse parties are unknown, and only avers that the plaintiffs are informed and believe them to be citizens of Massachusetts. This is not sufficient; the parties should be named, and their citizenship or alienage averred on the record. But this objection is cured by the appearance of the respondents, who admit themselves to be citizens of Massachusetts, and aver an adverse interest, and, *non constat*, that there are any other adverse interests in the case. Upon the whole, I overrule the motion for dismissal of the suit.

Motion overruled.

LORMAN v. CLARKE.

(Circuit Court for Michigan: 2 McLean, 568-578. 1841.)

Opinion by the COURT.

STATEMENT OF FACTS.—The complainants set out in their bill that they obtained a judgment at law against the defendant, for ——— dollars, and having issued an execution against his property, it was returned that he had no property, real or personal. And the bill states that the defendant has equitable interests, choses in action, and other property, which the complainants are not able to discover and reach by execution at law. That he has money and personal property, either in possession, or held in trust, and has equitable interests in real estate, the particulars of which are unknown; and the complainants pray a discovery and relief in the premises. The defendant demurs to so much of said bill as seeks discovery and relief, touching the equitable rights and interests of the defendant, or any other part of the bill which seeks a satisfaction of the judgment, out of any other property than that which is subject to execution.

This proceeding is attempted to be sustained by the complainants on two grounds: First. Under the statutes of this state. Second. On general chancery principles.

The twenty-fifth section of the act of Michigan, in relation to a court of chancery (Revised Statutes, 365), provides “that whenever an execution, against the property of the defendant, shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of property, or things in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or things in action, or the payment, or delivery thereof, to the defendant, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant.” And power is given to the court to compel such discovery, prevent such transfer, and to decree satisfaction of the sum remaining due on the judgment, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him. There are other statutes of the state which may have some bearing on the remedy thus provided, but it is not necessary, in deciding this case, to refer to them.

§ 596. *The chancery powers of the federal courts are uniform and independent of state laws.*

That, under the above statute, the courts of the state, exercising chancery powers, may give the relief sought in this bill, on the facts stated, is admitted. But it is insisted that this court, deriving its jurisdiction under the constitution of the United States and the acts of congress, have no power to act in the case. That it is not in the power of a state legislature to restrict, or enlarge, or in any manner to modify, the equitable jurisdiction of the federal court. And a great number of authorities are cited from the decisions of the supreme and circuit courts of the United States to establish this point. Without a particular reference to these authorities it may be admitted, in the broadest sense, that the equitable powers of this court are derived from the federal government. The second section of the third article of the constitution declares "that the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States," etc. And it is well observed by Mr. Justice Story, that the uniform interpretation of the above clause in the constitution has been, that by cases in equity are meant cases which in the jurisprudence of England are so called, as contradistinguished from cases at common law. So that in the courts of the United States equity jurisprudence embraced the same matters of jurisdiction and modes of remedy as exist in England. 1 Story's Com. on Eq., 64, 65.

The act of congress of 1792 declares "that the modes of proceeding in suits of equity shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law, except so far as may have been provided for by the act to establish the judicial courts of the United States." The eleventh section of the act of 1789 gives to the circuit courts jurisdiction of all suits of a civil nature, at common law or equity, where the sum exceeds \$500. In some of the states there is no court of chancery, but this does not affect the exercise of a chancery jurisdiction by the federal court in such states. This jurisdiction extends alike to all the states. And it gives relief, where plain and adequate redress cannot be had at law, agreeably to the well established rule in the English chancery. If a state were to authorize a chancery jurisdiction by her own courts in all controversies concurrently with a court at law, this would not enlarge the jurisdiction of the federal court of chancery. It could only interpose its remedial powers where the remedy was inadequate at law.

§ 597. *Rules of practice.*

The rules of practice of the high court of chancery, in England, have been adopted by the supreme court, and are obligatory upon the circuit courts. They have power, however, to adopt other rules not inconsistent with the general rules. It is argued that, in the exercise of the powers thus given and defined, we must look to the settled principles of an equitable jurisdiction in England; and that no relief can here be given which could not be given in that country. And that what a federal court of chancery may do in one state it may do in another. That its jurisdiction not being derived from the laws of a state, its powers are in no respect influenced by such laws. That if a different rule were to prevail the court would lose the national character which was intended to be given to it by its organization under the laws of the Union.

§ 598. *Rules of decision derived from local law.*

The judiciary of the United States constitutes a co-ordinate and independent branch of the government; and its powers are co-extensive with the laws. It

was designed, undoubtedly, to secure a uniform construction and enforcement of the laws of the Union. And in this respect, in all the states, the rule of decision is unvaried. But the federal court has jurisdiction between citizens of different states, as well as in cases arising under the laws of the United States. And where controversies are brought before it which do not arise under the laws of the Union, by what law are they to be determined? The law of the contract is the law of the place where it was made and was to be executed. There is no unwritten or common law of the Union. This rule of action is found in the different states, as it may have been adopted and modified by legislation and a course of judicial decisions. The rule of decision, then, must be found in the local law, written or unwritten. No foreign principle attaches to the federal court when exercising its powers within a state. It gives effect to the local law under which the contract was made, or by virtue of which the right is asserted. And this independently of any act of congress adopting the modes of proceedings, at common law, of the state courts. And the principle applies as well to proceedings in chancery as at law.

§ 599. *Jurisdiction derived from constitution and law of United States.*

The term jurisdiction is often used, not very appropriately, more in reference to the subject-matter of the contract, or right set up, than to the capacity of the court. The capacity of the federal court for the exercise of chancery powers is received from the laws of the Union. It is not dependent for this, in any degree, on the local law. But these powers are exercised in all cases where the contract or right comes appropriately under them.

If a right exist within a state which cannot be enforced at law, and which properly belongs to a chancery jurisdiction, there can be no doubt that relief may be given by the federal court. And it is immaterial whether a similar right has come under the action of a court of chancery in this country or in England. The right may be new. It may originate under a local statute or usage and exist nowhere else. But this constitutes no objection to its enforcement. The inquiry is, is there no adequate relief at law, and does the right come within the powers of a court of chancery? Now, can it be said that in a case like this the jurisdiction of the court is derived from the local law. As in all other cases which do not arise under the laws of the Union, the local law governs the contract or right, but the power to act on it is derived from the laws of the Union. The circuit court of the United States have a general common law jurisdiction in a state. Their powers of common law and chancery are alike derived from the laws of the Union. For the laws of a state and the modes of proceeding of its courts, which form a rule for the federal court at law, in the exercise of its jurisdiction, are in force only by reason of their adoption by act of congress.

§ 600. *Distinction between subject-matter on which the courts act, and jurisdiction or power to act.*

Now, to the exercise of this common law jurisdiction can it be objected that the right set up in the declaration is new, and has never before been asserted? Is not the proper inquiry whether the right be a legal one; and if it is, the action may be sustained? And if, in such a case, the plaintiff shall fail to establish his right by proof, is the failure attributable to a want of jurisdiction in the court? The jurisdiction to afford an ample remedy at common law is clear, but the case for the action of the court must be made out by the evidence. The subject-matter, then, on which the court acts, is altogether dis-

inct from its jurisdictional powers. The one is the contract, the other the powers by which it is enforced. The contract originates under and is governed by the local law; the jurisdiction is derived from the laws of the Union. And this view is applicable as well to the chancery as to the common law powers of the circuit court.

§ 601. *Authorities reviewed, showing that the federal courts, deriving their equity powers solely from the constitution and laws, will enforce equitable rights, however originating.*

A reference to the decisions of the supreme and circuit courts of the United states will show that this has been the settled course of action. In the state of Kentucky land titles were generally acquired by the location of a warrant on a tract of land giving a specific description of the beginning corner of the survey and describing the boundaries. This was called an entry of the land, but it was indispensable to the validity of the entry that it should call for some object generally known in the nearest settlement. And if such object was not called for, the holder of a warrant could subsequently enter the same land, though he had full notice of the prior location. The well-established doctrine of notice in fact was discarded, and the call in the entry for an object generally known was substituted for it. This was an innovation upon the principles of equity, but by the practice of the courts of Kentucky it was established as a rule of property. This system was *sui generis*. It was an artificial superstructure reared chiefly by judicial action. New principles and modes belonged to it. It had no foundation in the jurisprudence of England. And yet this system was regarded by the courts of the United States as the local law of property. And as the courts of Kentucky considered an entry as an equitable title, and gave relief to the claimant against an elder patent on a junior entry for the same land, the courts of the Union adopted the exercise of their equitable powers to the attainment of the same end.

In the case of *Bodley v. Taylor*, 5 Cranch, 191, Mr. Chief Justice Marshall says it has been sufficiently shown that the practice of resorting to a court of chancery, in order to set up an equitable against the legal title, received, in its origin, the sanction of the court of appeals while Kentucky remained a part of Virginia; and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken. And, he remarks, the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself. And what can justify that assumption but the opinion that cases of this description come within the sphere of its general action. In all cases in which a court of equity takes jurisdiction it will exercise that jurisdiction upon its own principles. The court, therefore, he says, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery.

In Tennessee land titles were acquired by entry as in Kentucky, but in the former state the elder entry is regarded, when connected with a junior patent, as constituting a part of the legal title. So that, in one of these states, relief is given in equity, and in the other at law, on substantially the same facts. And such is the action of the federal courts in those states. This forcibly illustrates the influence of the local law. In one state the right is held to be equitable, in the other legal, and it is acted on accordingly by the respective jurisdictions. In the state of Kentucky a statute provides that, in certain cases, persons hold-

ing distinct titles may be united in the same action. And the supreme court have held that, under this statute, parties may be united in a suit in chancery who have no common interest. *Lewis v. Marshall*, 5 Pet., 470.

In the case of *Clark v. Smith*, 13 Pet., 195, under the act of Kentucky of 1796, which provides that any person having both legal title to and possession of land may institute a suit against any other person setting up a claim thereto; and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto, etc., the court held it afforded ground for relief. They say the state legislatures have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and, at the same time, prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts. In Ohio a statute gives to a decree for a conveyance of title the same effect as a deed formally executed. But in Kentucky, the conveyance under a decree is required to be executed by a commissioner appointed by the court. These statutes have uniformly been considered as applicable to the federal courts, and many land titles rest upon them.

More authorities might be cited, if more were necessary, to show that the courts of the United States, in the exercise of their chancery powers, will enforce equitable rights, whether they originate by contract, by local usage, or by the statutes of a state. And the principle is the same, whether such rights relate to titles for land or not. If full and adequate relief cannot be given at law, relief may be sought in chancery. It is important, and the supreme court have often said so, that, in regard to land titles, there should be but one rule of decision in a state. But the same remark may be applied, with equal force, to any rule of property. Whether the contract or right be equitable or legal, the same effect should be given to it in the federal as in the state courts.

§ 602. *The statute of Michigan having given creditors an equitable right to subject the property of a debtor to the payment of his debts, the federal court has power to enforce this right.*

In the case under consideration, the statute declares, in substance, that all equitable rights, however held by the judgment debtor, may be reached by the plaintiff, to satisfy the judgment, by a bill in chancery. Now, these rights cannot be reached by an execution at law; and if, as the defendant's counsel contend, they are not subject to the ordinary action of a court of chancery, still, under the statute, they are proper objects of chancery jurisdiction. It is, unquestionably, in the power of a legislature to subject the personal and real estate of the judgment debtor to the payment of his debts, in such mode as they shall prescribe. And they have in the above statute subjected his choses in action, and other equities, with this view, to the action of a court of chancery. Here, then, is a right given to the plaintiff—a right which a court of law cannot enforce, and which the statute declares may be enforced in equity. This right, then, by the statute, is brought within the action of a court of chancery, if it was not within it before. It is, therefore, an equitable right, made so by the statute, and which the circuit court, equally with a state court, may enforce, by the exercise of its chancery powers.

In the language of the supreme court, in the above cited case of *Clark v. Smith*, the legislature having created a right, and, at the same time, prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent

with the ordinary modes of proceeding on the chancery side of the federal courts, no reason is perceived why it should not be pursued as in the state courts.

This authority covers the whole ground. Had the question, now under consideration, been before the supreme court, language more appropriate to its decision could not have been used. The right was created, and declared to be an equitable one. A court of chancery can act upon such right, in accordance with established principles, and the modes peculiar to its organization. But the supreme court say, even the forms of proceeding authorized by the statute may be followed by the federal court, if not inconsistent with the rules of chancery. It is the characteristic of a court of equity to regard substance more than form. Having jurisdiction of a subject matter, in the language of the late Chief Justice Marshall, it will exercise it upon its own principles. We think the present bill is clearly sustainable under the statute, which gives to the complainant the discovery and the relief prayed for in his bill.

§ 603. *On the general principles of equity, the property of a debtor may be subjected to the payment of his debts.*

And we are also of the opinion that the bill is sustainable on the general principles of equity, independently of the statute. It would, indeed, be a reproach to the administration of justice, if a debtor, by converting his estate into choses in action or stocks, or, if his estate consisted of such property as cannot be reached by an execution, he should be able to hold it in defiance of his creditors. At common law, an equitable estate cannot be sold on execution; but who ever doubted that it might be sold by a decree in chancery? And, in the case of *Van Ness v. Hyatt*, 13 Pet., 300, the supreme court say that an equitable interest in personal property is governed by the same rule. Being satisfied on the first ground, it is unnecessary to examine this one. It would not be difficult to show that, both on principle and authority, the second ground is sustainable. The demurrer must be overruled.

BURT v. KEYES.

(Circuit Court for Ohio: 1 Flippin, 61-73. 1861.)

STATEMENT OF FACTS.—Henry Keyes was a partner in the firm of Keyes, White & Co. The firm failed on the 8th February, 1858, and on the 28th of the month Henry Keyes conveyed all his property to his two sons, Henry and Elias, giving them ten years to pay for it. The bill was filed by judgment creditors of the firm to have this deed set aside as fraudulent.

Opinion by WILSON, J.

The two important inquiries involved in the case are, 1st. Was the sale made by Henry Keyes to his two sons on the 28th of February, 1858, a fraudulent sale as to his creditors; and 2d. If the sale was fraudulent, then have these complainants any prior equities over the other creditors of Henry Keyes by virtue of this proceeding in chancery, or do his creditors all stand upon equal footing under the operation of the seventeenth section of the act of the Ohio legislature, regulating assignments, passed April 6, 1859? Vol. 56 Stat., p. 225.

§ 604. *What is fraud, and when it may be presumed.*

Fraud is not to be considered as a simple fact, but a *conclusion* to be drawn from all the circumstances of the case. It may be inferred from the nature of the contract itself, or from the condition or circumstances of the parties. The general principle is well settled that equity will give relief against *presumptive*

frauds, and therein will go further than courts of law, where fraud must be proved and not presumed. It is true that some eminent judges have said that a *deed* cannot be fraudulent unless it be fraudulent both in law and equity. But it was the clear doctrine of Lord Hardwicke, and of the English court of chancery up to his time, that there are many instances of fraud that would in equity affect instruments in writing concerning lands, of which the law could not take notice. In accordance with these principles a great number and variety of modern cases have been decided in England and in this country, and relief afforded in equity, where, from the nature of the transaction and situation of the parties, *fraud might be presumed*.

§ 605. *A sale under the circumstances held to be fraudulent.*

What, then, were the circumstances attending the sale of the land in question on the 28th of February, 1858, and what was the relation of the parties in that transaction to one another and to the creditors of Henry Keyes? From the bill, answers, and the mass of testimony produced at the hearing of the cause, some leading facts stand out as prominent as they are in themselves important.

It appears that for some time previous to February, 1858, Henry Keyes was a partner in the mercantile firm of Keyes, White & Co., doing business at Beloit, in the state of Wisconsin. The individuals comprising that firm were Ira White, the defendant Keyes, and his son Martin Keyes. As between the partners themselves, Henry Keyes had no pecuniary interest in the profits of the concern, but entered into the firm to give it credit and to advance the interest of his son Martin. From the acknowledged wealth of Henry Keyes, the firm easily obtained credit for goods purchased to a large amount, so that on the 8th of February, 1858, its outstanding liabilities had accumulated to the sum of \$54,800. On that day the concern failed and made an assignment of the company's assets at Beloit, to Edwin R. Wadsworth, for the benefit of the creditors. The assignment was made, and the proper transfer of the assets executed by all the partners, including Henry Keyes. It is not a little singular that the testimony of Ira White, the book-keeper of Keyes, White & Co., and that of Wadsworth, the assignee, though full in other respects, does not disclose the character or amount of the assets that passed into the hands of the assignee. It was within the next twenty days after the assignment of the company's property that Henry Keyes conveyed all his unincumbered real estate in Ohio to his two sons, Elias and Henry P. Keyes, and the sale was made upon an extended credit, running through a period of ten years.

Henry Keyes, in his answer, avers that in consequence of his impaired eyesight and the increasing infirmities of old age, he had for a long time previous contemplated some arrangement with his sons by which he should be relieved from the cares incident to the management of his property. And he says the conveyance made by him on the 28th of February was done in good faith, and without reference to any pecuniary embarrassment of his own, or that of Keyes, White & Co. But we are unable to reconcile this interpretation of the purpose of the conveyance with the necessary consequences of the transaction upon the rights and interests of creditors.

It clearly had the effect of hindering and delaying the creditors of Keyes, White & Co. in the collection of their debts from the only responsible member of the firm, and in making the conveyance Henry Keyes must be considered as having contemplated the legitimate consequences of his own act in that regard. So far as the rights of third persons are concerned, it is an unwarrant-

able assumption to claim that the chief and responsible partner knows nothing of the affairs of the partnership. He had already been called upon to adjust its debts, and had in fact pledged, by way of mortgage, his private property for the payment of \$20,000 of the liabilities of the firm. This pecuniary embarrassment of the firm of Keyes, White & Co., this extension of the payment of \$20,000 of the liabilities which had become due, and security given therefor, and also the assignment of the assets of the firm to a trustee for the benefit of creditors, were facts known to all the parties to the conveyance (made on the 28th of February, 1858), when the deeds were executed.

There is some testimony tending to show that no change of possession of this property was had after the alleged sale, and that Henry Keyes has since that time had the sole management and control over it. But from a just view of the undisputed facts in the case, the *fraudulent sale* is sufficiently apparent, without any consideration of the fact of the vendor's retaining possession or control of the land. It is perfectly clear from all the circumstances attending the bargain and sale, and from the intimate family relation of the parties to the transaction, that the purpose of the pretended sale was, either to save the property of Henry Keyes from the sacrifice of a forced sale upon attachment or execution, or to put his property in such a condition as to enable him to coerce a compromise with his creditors on terms favorable to himself. In either view, the conveyance must be declared fraudulent and void. We come to this conclusion with less reluctance, since it appears that after the commencement of this suit, the parties to the deed have themselves abandoned the sale, and canceled the securities given for the purchase price.

§ 606. *Ohio statute as to sales in fraud of creditors.*

The next inquiry is: Have these complainants, by this proceeding in equity, obtained rights in or liens upon the property in question, to the exclusion of the other general creditors of Henry Keyes? Or do all of his creditors stand upon equal footing, under the operation of the act of the Ohio legislature of April 6, 1859? The seventeenth section of the state law provides that "all transfers, conveyances or assignments made with the intent to hinder, delay or defraud creditors shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the probate judge, after any such transfers, conveyance or assignment shall have been declared by a court of competent jurisdiction to have been made with the intent aforesaid, on the application of any creditor, shall appoint an assignee according to the provisions of this act, who, upon being duly qualified, shall proceed by due course of law to recover possession of all property so transferred, conveyed or assigned, and to administer the same as in other cases of assignments to trustees for the benefit of creditors."

It was insisted by the complainants' counsel, in the argument, that this court is not to be governed by the state statute. *First*, because this is a suit in equity, and therefore not within the provisions of the thirty-fourth section of the judiciary act of 1789; and *second*, that it is impossible for this court to carry out the requirements of the state law, and hence its recognition (as binding authority) would oust the circuit court of that jurisdiction of suits in equity which rightfully belongs to it.

§ 607. *Where there are several authorities competent to bind property, it is for all purposes bound by the one first attaching.*

The legal principle involved in this branch of the case is of great practical importance to creditors pursuing remedies against fraudulent debtors in Ohio,

and therefore properly demands a careful consideration. The question here is not a question of the jurisdiction of this court over the subject-matter of the suit. It is admitted on both sides, that, by this proceeding in equity, the circuit court of the United States for the northern district of Ohio, sitting as a court of chancery, has acquired jurisdiction over the land alleged to have been fraudulently conveyed, and that it has ample power to declare the sale fraudulent and void. Hence those adjudged cases, by which questions of jurisdiction merely have been determined, have no application as authority in the case.

The case of *Williams v. Benedict*, 8 How., 107, was where, by a statute of Mississippi, it was provided that if it appeared to the orphans' court of the state that the estate of a deceased person was insolvent, it was made the duty of that court to direct the property to be sold by the executor or administrator, and to appoint commissioners to audit the claims of creditors, and to distribute the proceeds of the property among the creditors in proportion to the amount due to them respectively. That case was taken to the supreme court of the United States (on appeal) by the administrator of an estate which had been declared insolvent by the orphans' court. The appellee had obtained judgment against the administrator in the United States court for the northern district of Mississippi before the adjudication of insolvency by the orphans' court, and had issued execution and levied on property upon which the judgment was a lien in case the estate was solvent.

Upon a bill, filed by the administrator to stay proceedings on this execution, the judgment creditor insisted that the estate was not insolvent, but had been squandered by the administrator, and that the proceedings in the orphans' court, under the local law, were no bar to his recovery in a court of the United States, and the court below dismissed the bill for that reason. The supreme court, however, reversed the decree, and in doing so put its decision on the ground that *the jurisdiction of the orphans' court had attached to the assets*, and they could not be seized by process of a court of another jurisdiction. So, too, in *Wiswall v. Sampson*, 14 How., 52, it was held that where certain lands were in the possession and control of a receiver, appointed by the court of chancery of Alabama, in a case pending before it, they could not be sold by a marshal upon execution issued out of the circuit court of the United States, although the judgment on which process issued was a lien upon lands, and the execution was levied before the receiver obtained actual possession of the property.

These decisions of the supreme court, and others of the same import, are based upon the familiar doctrine declared by Lord Ellenborough in *Payne v. Drewe*, 4 East, 523, that where there are several authorities equally competent to bind the specific property of a party, such property shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon it, or obtains control over it, by means of process against the proper persons.

The bill, in this case, was filed on the 11th day of May, 1859. The judgments in favor of the complainants (on which this chancery proceeding is predicated) were recovered in August, 1858, and April, 1859, during all which time the legal title to the land in question was in Henry P. and Elias H. Keyes, in virtue of the fraudulent conveyance made on the 28th of February, 1858. At the time of filing the bill, no court of competent jurisdiction had declared the conveyance fraudulent. The rights of the complainants in the land are therefore determined according to the condition of the parties and of the conveyance at the time the bill was filed.

§ 608. *State laws are rules of decision for United States courts sitting in trials at common law, but not in equity.*

The sale and conveyance being now declared fraudulent and void, it becomes necessary to determine the distribution of the fund to accrue from a resale of the land under an order of court. And hence the question arises: Is the state law to be regarded as the rule of decision? Or, in other words, does the local law furnish a *rule of property*, or does it relate merely to the remedy incident to proceedings under the statute in the state tribunals?

By the thirty-fourth section of the judiciary act of September 24, 1789, it is provided that the "laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as *rules of decision in trials of common law*, in the courts of the United States, in cases where they apply." Were this the trial of a case of common law, there could be no question of the applicability of the statute of the state, as furnishing a rule of decision for this court. But the circuit court of the United States, sitting in chancery, is governed by the principles and usages of courts of equity as peculiar to themselves, and as contradistinguished from courts of common law. "For," as was said by Judge Story, 2 Sumn., 405, "the equity jurisdiction of this court is wholly independent of the local laws of any state, and is the same in its nature and extent in all the states; that is, it is the same in its nature and extent as the equity jurisdiction of England, from which ours is derived, and is governed by the same principles."

The same doctrine was asserted and maintained by Mr. Justice Washington, in the case of *McFarlane v. Griffith*, 4 Wash., 585. That was a proceeding in chancery, by which the complainant sought relief against his bond, given for the purchase of land. The suit was against the assignee of the bond, who was a purchaser for a valuable consideration, and without notice of any equities between the original parties. The statute of Pennsylvania provided that "the assignee of a bond or mortgage for a valuable consideration, and without notice, should stand in no better situation than the assignor, and should be exposed and subject to every legal and equitable defense that could be asserted against him." This statute was intended to abrogate the well-settled principle, universally recognized in courts of equity, viz.: That against a *bona fide* purchase for a valuable consideration paid, and without notice of those circumstances which form the basis of the plaintiff's equity, the chancellor will take no step and grant no relief whatever.

The court in that case held that the state law had no application as a rule of decision for the federal courts sitting in chancery, and the cause was decided without regard to the statute, in accordance with the principles recognized and acted upon in courts of equity. So in *Gaines v. Relf*, 15 Pet., 9, it is declared that the federal courts having equity powers are bound to proceed in equity causes according to the principles, rules and usages which belong to the courts of chancery, as contradistinguished from the courts of common law.

These decisions have their foundation in the principle incorporated into the act of congress of May 8, 1792, which requires "the mode of proceedings in suits in equity to be in accordance with the principles and usages of courts of equity;" and the supreme court of the United States, in *Suydam v. Broadnax*, 14 Pet., 67, have gone further, and declared that the eleventh section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States. "It was certainly intended to give the

suitors having a right to sue in the circuit court, remedies co-extensive with those rights." And (the court say) these remedies would not be so if any proceeding under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court. The same doctrine is again maintained by the supreme court in the late case of *Green v. Creighton*, 23 How., 90.

§ 609. *How far a state statute constitutes a rule of property.*

But it is said that the Ohio statute of April 6, 1859, operates as a rule of property, and for that reason furnishes a rule of decision for this court in causes of equity as well as in cases at common law. In some respects and in certain contingencies this claim of counsel is well founded. In a case of fraudulent conveyance (contemplated by the statute), if the state courts obtain jurisdiction of the subject-matter of the transaction, that jurisdiction is doubtless complete and effectual for all purposes, as well in determining the rights of creditors as in carrying out the remedies provided for in the state law, where that law has application. And wherever that jurisdiction is properly obtained by the state courts, and the assignee appointed by the probate judge acquires possession and control of the fraudulent debtor's property, he has unquestioned authority to dispose of it and give a title that will be good and sufficient everywhere. To this extent the state law may be regarded as furnishing *a rule of property*. But further than this it has no efficiency, as a rule of decision for this court in the exercise of its chancery powers.

§ 610. *A creditor by filing his bill may acquire a preference.*

By the well-settled principles and long-established usages of courts of equity, the doctrine is plain that "the vigilant creditor, pursuing his claim, acquires a preferable equity which attaches and becomes a specific lien by the filing of his bill." And no court in the Union has maintained this doctrine more firmly than the supreme court of Ohio. 6 O. R., 156; 7 O. R., 21; 13 id., 198. This preferable equity of the vigilant creditor is a right as well defined and as exclusive of the claims of other creditors as is the right secured by a judgment lien upon the debtor's property.

The only remaining question in the case is, shall the judgment creditors of Henry Keyes, who are made defendants in this suit, be admitted with the complainants to an equal participation in the fund? It was competent for the complainants to commence and prosecute this suit for the joint benefit of themselves, and all and any portion of the creditors of Henry Keyes. If it was their purpose to seek relief for creditors other than for themselves, that intention should have been manifested by suitable averments in the bill. It is a right of an antagonistic defendant to have all the material facts on which relief is sought specifically set forth in the bill, that such facts may be admitted or controverted by answer and testimony, and no proofs in the cause will be admitted unless *secundum allegata*.

The bill does not contain any averment that the suit is brought or is to be prosecuted for the benefit of other creditors. Lee and other judgment creditors of Henry Keyes are made defendants, and the bill avers their interests and rights to be subject and subsequent to the rights and equities of the complainants. The answers of the defendants, who are judgment creditors, cannot supply this defect, and thereby make an issue not tendered by the bill. We are, therefore, of opinion that these defendants have acquired no prior equities over the other general creditors of Henry Keyes by this suit.

Hence, the fund to accrue from a sale of the land in question must be appor-

tioned and applied as follows: 1st. In payment of the taxable costs of this suit. 2d. In payment of the debt described in the bill as due the complainants. 3d. The residue, if any, to be apportioned and paid to all the other creditors of Henry Keyes in proportion to the amount of their respective claims, according to the requirements of the Ohio statute of April 6, 1859.

STRETTELL v. BALLOU.

(Circuit Court for Colorado: 3 McCrary, 46-48; 9 Federal Reporter, 256, 257. 1881.)

§ 611. *The equity jurisdiction of the federal courts is wholly derived from the constitution and laws, unaffected by state statutes.*

Opinion by McCRARY, J.

It has long been settled that the jurisdiction of the circuit courts of the United States in equity is derived from and defined by the constitution and laws of the United States; that it is the same in all the states, and is not to be affected or varied by the various statutes of the states, whereby the chancery powers and jurisdiction of state courts may be defined and regulated. This court cannot, therefore, look to any state legislation as the source of its jurisdiction in equity. In *Boyle v. Zacharie*, 6 Pet., 658, Chief Justice Marshall, speaking for the supreme court, thus stated the rule: "And the settled doctrine of this court is that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated in those acts, the courts of the United States may from time to time prescribe." And see, to the same effect, *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 Wheat., 115; *Neves v. Scott*, 13 How., 271; *Noonan v. Lee*, 2 Black, 500; *Johnston v. Roe*, 1 McC., 162. It follows, from these authorities, that unless the jurisdiction of this court can be derived from the constitution and laws of the United States alone, it does not exist.

Section 913 of the Revised Statutes of the United States declares that the modes of proceeding in equity causes shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law; and this language refers to the principles, rules and usages by which the high court of chancery of England was governed at the time the judiciary act was passed.

§ 612. *The holder of a mere possessory interest in land cannot maintain a petition for partition.*

It is very clear that, according to the general principles of equity jurisprudence as administered in England at the time of the passage of the judiciary act, and as administered by courts of chancery in this country, except where a different rule is adopted by statute, the holder of a mere possessory interest in land, and not having title thereto, cannot maintain a bill for partition. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned. *Horncastle v. Charlesworth*, 11 Simons, Ch., 314; *Williams v. Wiggand*, 53 Ill., 233; *Ross v. Cobb*, 48 Ill., 111. It is not claimed that there is any act of congress conferring upon this court jurisdiction in equity of a bill for partition brought by the owner of an undivided interest in a mining claim where the legal title to the real estate remains in the United States. It follows that this bill must be dismissed for want of jurisdiction. If the statutes of the

state of Colorado, relied upon by counsel for complainant, confer jurisdiction upon the courts of the state in a case of this character, the complainant must resort to those courts.

§ 613. **Suit against county.**— When a county, duly authorized, issues warrants for money payable to bearer, and a bank holds them for good consideration, a subsequent state law taking away the suable character of counties impairs the obligation of the contract, and is therefore unconstitutional, and will be no bar to a suit by the bank on the warrants in the federal courts. *National Bank v. Sebastian County*, 5 Dill., 416 (CONST., §§ 1903-4).

§ 614. The board of supervisors of a county in Illinois may be sued in a federal court, notwithstanding the law of the organization of counties, which had been construed by the supreme court of Illinois to exempt them from suit except in the county circuit courts. *Cowles v. Mercer County*,* 7 Wall., 118.

§ 615. A statute of Missouri providing that all actions whatsoever against any county shall be brought in the circuit court of such county does not deprive the federal courts of jurisdiction, in a proper case, in an action against a county of that state. *Cunningham v. County of Ralls*,* 1 McC., 117.

§ 616. **State insolvent law.**— An order issued by the legislature of a state before which a debtor has applied for the benefit of the insolvent act of the state, ordering a stay of all process against the debtor while such application is pending, is not a bar to an action against the debtor by a creditor, resident in another state, in the circuit court of the United States. *Babcock v. Weston*, 1 Gall., 169.

§ 617. The state laws as to the discharge of prisoners from custody do not apply to prisoners committed by United States authority to the custody of a sheriff. *McNutt v. Bland*, 2 How., 9 (§§ 878-880).

§ 618. **Penal law of state.**— Under a Mississippi statute, a sheriff failing to pay over moneys collected on an execution was liable with his sureties for the full amount collected, with twenty-five per cent. damages and interest at eight per cent., the same to be recovered upon motion before the court which rendered the judgment. A similar proceeding was instituted in the circuit court against a marshal, and the motion was granted. On error it was held that the process act of 1828 adopted the statute in question, to be applied in the federal court so far as to authorize a judgment by motion for failing to pay over moneys collected for the full amount, with legal interest; but that the provision giving twenty-five per cent. damages was a penal law of the state and could not be enforced by a federal court; hence for so much the judgment could not stand. *Gwin v. Breedlove*,* 2 How., 29.

§ 619. **State law as to joinder of maker and indorser.**— A suit was brought in the United States circuit court for Mississippi, by a non-resident plaintiff, in which the maker and indorser, citizens of Mississippi, were joined as defendants. This was to satisfy a statute of the state requiring such joinder, which had been adopted as a rule of court by the circuit judge. *Held*, that the statute had no effect in the United States court, it not being competent for a state legislature to regulate proceedings in or to increase or diminish the jurisdiction of a United States court. It could not give jurisdiction over the maker because of the exception in the eleventh section of the judiciary act, forbidding recovery by an assignee in cases where there could be no recovery if no assignment had been made; and it could not take away the jurisdiction of the court over the indorser. *Keary v. Farmers' and Merchants' Bank*,* 16 Pet., 89.

§ 620. **State law as to joint and several liability.**— By a statute of Mississippi a joint liability on a note is made a joint and several liability. When a suit was begun in the circuit court for Mississippi against several parties who were jointly liable, and a discontinuance being entered as to all but one, judgment was rendered against him, *held*, that the case was governed by the local statute, and the judgment was valid. *Coffee v. Planters' Bank*,* 13 How., 183.

§ 621. The United States circuit court for Illinois adopts the remedies authorized in the state courts, though they may be local and peculiar, and accordingly will issue a *scire facias* on a mortgage under the statute of the state. *Strachen v. Clyburn*,* 3 McL., 174.

§ 622. **Forcible entry and detainer.**— A statute was passed in Illinois, in 1874, giving the state courts jurisdiction in cases of forcible entry and detainer. *Held*, that this is a civil suit within the meaning of the judiciary act of 1789, and in proper cases the federal courts have jurisdiction. *Wheeler v. Bates*,* 6 Biss., 88.

§ 623. **Discharge of garnishee.**— Where a party was summoned as a trustee in Massachusetts, in the circuit court for that district, and upon his disclosure it appeared that by the state statute, as interpreted by the local courts, he would be entitled to his discharge, he was discharged. *Peters v. Rogers*,* 5 Mason, 555.

§§ 624-633. COURTS.—JURISDICTION OF UNITED STATES COURTS.

§ 624. **Foreclosure of mortgage.**—A state statute allowing guardians to mortgage the property of wards provided that foreclosure proceedings should be begun only by petition to a certain state court. *Held*, that, notwithstanding this proviso, a mortgagee in a proper case may file his petition in the federal court; and the fact that the subject-matter of this suit is real property, and that the state ought to have controlling authority in the alienation of real estate within its limits, is no ground of distinction between this and other similar cases. *Davis v. James*,* 2 Fed. R., 618.

§ 625. **Miscellaneous.**—When a question of jurisdiction is decided by a state court of general jurisdiction, the same question cannot be raised in the federal courts by the same parties, though it is within the power of the court to investigate the point and see if the decision is correct. *Moch v. Virginia Fire & Mar. Ins. Co.*, 10 Fed. R., 709 (§§ 501-507).

§ 626. On a bill in equity to restrain the defendants from building a bridge over the Connecticut river between Saybrooke and Lynn, it was held that the Connecticut being a public river at this point, this court had jurisdiction of the suit, although the erection of the bridge was authorized by the Connecticut legislature. *Baird v. Shore Line R'y Co.*, 6 Blatch., 276.

§ 627. A federal court is not limited in its jurisdiction by a statute passed by the legislature of a state declaring that "settlements made in the county court shall be *prima facie* evidence in favor of the accounting party," as this statute is not a rule of evidence, but a declaration of the force and effect of the judicial decree in the county court approving the settlement. *Pulliam v. Pulliam*, 10 Fed. R., 27.

5. *Extent of, When Once Attached; Auxiliary Proceedings.*

SUMMARY — *Bill of revivor*, § 628. — *Creditor's bill in aid of judgment*, § 629. — *Hearing third parties irrespective of citizenship, when necessary*, § 630. — *Bill involving new matters not an auxiliary bill*, §§ 631, 632. — *Creditor's bill in circuit court not auxiliary to suit in district court*, § 633.

§ 628. The federal court has jurisdiction of a bill brought by an administrator to revive a suit abated by death, without regard to the citizenship of the administrator. *Clarke v. Matthewson*. §§ 634, 635.

§ 629. A creditor's bill filed in aid of an unsatisfied execution is a continuation of the original suit, and the jurisdiction of the court is not affected by a change of residence subsequent to the institution of the suit, and before the filing of the creditor's bill. *Hatch v. Dorr*, §§ 636, 637.

§ 630. In a cause in which jurisdiction depends upon the citizenship of the parties, if the rights and interests of third parties become involved, and no state court could give relief without a conflict of jurisdiction, the federal court will grant such third parties a hearing, irrespective of their citizenship, so far as to protect their rights and interests, and no farther. *Conwell v. Canal Co.*, §§ 638-642.

§ 631. A bill in equity cannot be deemed a proceeding incidental to a suit formerly begun, when it involves the decision of new matters and between different parties. *Ibid*.

§ 632. When in the course of a suit in the circuit court for dissolution of a partnership, a supplemental bill was filed bringing in a third party, charging him with collusion with defendant and seeking from him the specific performance of a contract, this was an original bill and not a supplemental proceeding of which the court could take jurisdiction irrespective of citizenship. *Myers v. Dorr*, §§ 643-647.

§ 633. The circuit court has no jurisdiction to entertain a creditor's bill filed in that court in aid of a decree obtained in the district court, when all parties are citizens of the same state. *Winter v. Swinburne*, §§ 648-650.

[NOTES.—See §§ 651-677.]

CLARKE v. MATTHEWSON.

(12 Peters, 164-173. 1838.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is the case of an appeal from the circuit court of the district of Rhode Island. The original cause was a bill in equity brought by Willard W. Wetmore, deceased, a citizen of Connecticut, against the defendants, Henry Matthewson and others, all citizens of Rhode Island, for an account upon certain transactions set forth in the bill, and with a prayer

for general relief. After the cause was at issue upon the hearing, it was, by agreement of the parties, ordered by the court to be referred to a master to take an account; and pending the proceedings before the master, the intestate died. Administration upon his estate was duly taken out by the present plaintiff, John H. Clarke, in the state of Rhode Island; the laws of Rhode Island requiring that no person not a resident of the state should take out letters of administration; and also making such administration indispensable to the prosecution and defense of any suit in the state, in right of the estate of the intestate. Clarke filed a bill of revivor in the circuit court, in June, 1834, in which he alleged himself to be a citizen of Rhode Island, and administrator of Wetmore, against the defendants; whom he alleged, also, to be citizens of the same state. So that it was apparent upon the face of the record, that the bill of revivor was between citizens of the same state. Upon motion of the defendants, at the November term of the circuit court, A. D. 1835, the court ordered the bill of revivor to be dismissed for want of jurisdiction; and from this decretal order, the present appeal has been taken by the appellant.

The case, as it was decided in the circuit court, is reported in 2 Sumner, 262, 268; and the ground of dismissal was, that the bill of revivor was a suit between citizens of the same state. The judiciary act of 1789, ch. 20, § 11 (1 Stats. at Large, 78), confers original jurisdiction upon the circuit courts of all suits of a civil nature at common law and in equity, where the matter in dispute exceeds the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party; or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. If, therefore, the present had been an original bill brought between the present parties, it is clear that it could not have been maintained; for, although the plaintiff could sue in *autre droit*, and as administrator of a citizen of another state, yet the suit would be deemed a controversy between him and the defendants, and not between his intestate and the defendants. This is the necessary result of the doctrine held by this court in *Chappedelaine v. Dechenaux*, 4 Cranch, 306, and *Childress v. Emory*, 8 Wheat., 642.

§ 634. *A bill of revivor is a continuation of the original suit, and an administrator may file it although a citizen of the same state with respondent. (a)*

The circuit court treated the present case as falling within the same predicament. In this we are of opinion that the court erred. The bill of revivor was, in no just sense, an original suit, but was a mere continuation of the original suit. The parties to the original bill were citizens of different states, and the jurisdiction of the court completely attached to the controversy; having so attached, it could not be divested by any subsequent events; and the court had a rightful authority to proceed to a final determination of it. If, after the commencement of the suit, the original plaintiff had removed into and become a citizen of Rhode Island, the jurisdiction over the cause would not have been divested by such change of domicile. So it was held by this court in *Morgan's Heirs v. Morgan*, 2 Wheat., 290, 297; and *Mollan v. Torrance*, 9 Wheat., 537; and *Dunn v. Clarke*, 8 Pet., 1.

The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. It might in suits at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it. But in courts of equity, an abate-

(a) Reversing *Clarke v. Matthewson*, * 2 Sumn., 262.

ment of the suit by the death of a party has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination of the suit. It may again be put in motion by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination as an original bill. The bill of revivor is not the commencement of a new suit, but is the mere continuation of the old suit. It is upon a ground somewhat analogous, that the circuit courts are held to have jurisdiction in cases of cross-bills, and injunction bills, touching suits and judgments already in those courts; for such bills are treated not strictly as original bills, but as supplementary or dependent bills, and so properly within the reach of the court, although the defendant (who was plaintiff in the original suit) lives out of the jurisdiction. A very strong application of the doctrine is to be found in the case of *Dunn v. Clarke*, 8 Pet., 1, where an injunction bill was sustained, although all the parties were citizens of the same state; the original judgment, under which the defendant in the injunction bill made title as the representative in the realty of the deceased, having been obtained by a citizen of another state in the same circuit court.

§ 635. *The judiciary act of 1789 construed to authorize the bringing of a bill of revivor by an administrator without regard to citizenship.*

But if any doubt could, upon general principles, be entertained upon this subject, we think it entirely removed by the thirty-first section of the judiciary act of 1789, ch. 20. That section provides that where, in any suit pending in the courts of the United States, either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, and that the defendant shall be obliged to answer thereto accordingly; and the court before whom the cause is depending is empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. Other auxiliary provisions are made to carry this enactment into effect. Now in this section, congress manifestly treat the revivor of the suit, by or against the representative of the deceased, as a matter of right, and as a mere continuation of the original suit; without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is depending, or to another state. Of the competency of congress to pass such an enactment under the constitution, no doubt is entertained. The present case falls directly within its purview; and we are, therefore, of opinion that the decree of the circuit court, dismissing the bill of revivor, ought to be reversed, and the cause remanded to the circuit court for further proceedings.

I take this opportunity of adding that I fully concur in all the reasoning of this court on this subject. After the decision had been made in the circuit court, upon more mature reflection, I changed my original opinion; and upon my expressing it in the circuit court, and upon the suggestion of the judges of that court, the case has been brought here for a final determination. I hope that I shall always have the candor to acknowledge my errors in a public manner whenever I have become convinced of them.

HATCH v. DORR.

(Circuit Court for Michigan: 4 McLean, 112, 113. 1846.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is a creditor's bill for discovery, filed upon a judgment obtained in this court in January, 1845, against Dorr; and, an execution having been issued on the judgment, was returned *nulla bona*. The bill is filed in aid of the execution; S. N. Rendrick is made a defendant as the trustee of Dorr. The complainant was a citizen of the state of New York at the time the suit at law was commenced, but before the return of the execution by the marshal he removed into this state. To the bill there is a general demurrer, which assigns for cause of demurrer that the court has not jurisdiction of the case, as the complainant abandoned his citizenship in New York, and is now a resident of Michigan, where the defendant resides.

§ 636. *A creditor's bill in aid of an execution is a continuation of the suit at law, not an original proceeding.*

This is not an original suit. "Original bills are those which relate to some matter not before litigated in the court by the same persons, standing in the same interests." "Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are an addition to or continuance of an original bill, or both." According to this definition, a creditor's bill is the continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant so as to be made liable to his judgment, which assets have been secreted or fraudulently assigned to defeat the judgment. An injunction bill is said not to be an original bill, as it sets up some matter of equity against the plaintiff's claim, of which he could not avail himself at law. In that case, as in this, equitable considerations are inquired into in the one case to carry the judgment into effect, and in the other to prevent the plaintiff from availing himself unjustly of a legal advantage.

§ 637. *A change of residence pending the suit does not oust jurisdiction.*

If the case before us be not an original suit, but the extension of a former controversy, the change of residence by the plaintiff cannot affect the jurisdiction of the court. 8 Pet., 1; 2 Wheat., 290; 4 Mason, 360; 5 Cranch, 288. It is well settled that, where jurisdiction of the court has once attached, no change of residence by the parties will oust that jurisdiction.

CONWELL v. WHITE WATER VALLEY CANAL COMPANY.

(Circuit Court for Indiana: 4 Bissell, 195-206. 1868.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This is a suit in equity. The defendants have demurred to the bill. And the question to be decided is whether the demurrer ought to be sustained. In support of the demurrer, several objections to the bill are urged. The principal point insisted on, however, is that this court has no jurisdiction to hear and determine the cause. Our attention will be chiefly directed to this objection.

The bill states that the complainant is a citizen of Indiana, and that the defendants, The White Water Valley Canal Company, and The Connersville Hydraulic Company, and the White Water Valley Railroad Company, are all Indiana corporations. There are twelve other defendants to the bill; and as to

their citizenship, the bill is silent. Under these circumstances, it is obvious that our jurisdiction of this case as arising from the jurisdiction of the parties to the bill cannot be sustained. Counsel for the complainant, indeed, admit this; but they contend that there are other facts in the case which support our jurisdiction. Whether this is so must be determined by the allegations in the bill. It will, therefore, be necessary here to state the substance of the bill.

The bill charges that, for many years past, the complainant has been, and still is, the owner of large tracts of land lying along White Water river, in Indiana, and is thereby entitled to the use of the water of that stream, in its natural flow past and through said lands; that this right had existed in him, and in those under whom he holds, for sixty years past; that before the year 1842, the state of Indiana constructed a canal along the valley of said river past and through said lands, and, by means of feeder dams in the river, diverted the water from its natural flow through said lands and to and by certain mills thereon, of which the complainant is, and long has been, the owner; that the state constructed said canal for the purpose of navigation only, and water power to propel machinery was only an incident thereto; that the landed and riparian proprietors, among whom was the complainant, who transferred to the state the right to locate the canal on their lands respectively and to divert the water of the river as aforesaid into said canal, did so on condition that the canal should be forever used for navigation; that by the terms of those transfers, a non-user of the canal for purposes of navigation would revert all the rights so transferred in the donors; that in the year 1842, the state transferred all its interest in said canal to the defendant, The White Water Valley Canal Company; that this company has long since ceased to use the canal for purposes of navigation, and now appropriates its waters solely to the purposes of propelling machinery; that all the defendants in combination have increased the height of a certain feeder dam on the river, whereby the flow of water through the complainant's lands and to his mills has been much decreased as compared with its flow when the canal was used for navigation; that the defendants have entered into divers fraudulent combinations and contracts relating to the canal and its water power in order to perpetuate the wrongs complained of; and that, by reason of the premises, the defendants have lost all right to the canal, its water power and privileges, and the same have reverted to the complainant and the other riparian proprietors on said river.

The bill further charges that after said transfer by the state, on the 2d of February, 1855, one Henry Vallette, to whom the White Water Valley Canal Company was then largely indebted, filed his bill in equity in this court against that company, charging said indebtedness, praying that other creditors of the company might be allowed to join him in that proceeding, and asking that an account should be taken and a receiver appointed to control the concern for his benefit. The bill avers that a receiver was appointed accordingly, and an account ordered to be taken; that a final decree was rendered against the company in favor of Vallette and others, including the present complainant, Abraham Conwell; that the said suit is still pending in this court; that the defendant, Hamlin, is the receiver, and has the possession of the property of the company; and that, as such receiver, he has made a fraudulent lease for the term of ninety-nine years renewable forever to the defendant, The Connersville Hydraulic Company. The bill fails to state in what respect said lease is fraudulent, or whether it was made under an order of this court.

The bill prays that said feeder dam be abated; that the defendants be

enjoined from keeping it up or increasing its height; and that they be required to permit the water to pursue its natural channel in the river.

Thus have we attempted to state as much of the bill as will throw any light on the question of jurisdiction. To attempt more would be a serious labor, as the bill fills thirty-six printed pages. Under this state of facts, the question is, Can this court take jurisdiction of the case without regard to the citizenship of the parties?

§ 638. *As a general rule the jurisdiction of federal courts depends on the citizenship of the parties.*

In most cases in this court the jurisdiction depends on the citizenship of the parties. The reason of this is, that the second section of the third article of the national constitution, and the eleventh section of the judiciary act, give to this court jurisdiction of suits between citizens of different states. And it follows that, in all cases falling within these provisions, the pleadings must show that the plaintiff and defendant are citizens of different states. And, though most of the suits in this court must be subject to this general rule, yet there are many exceptions to it. Thus in revenue cases, and copyright and patent right cases, and in many others, the jurisdiction depends on the subject-matter of the suit, and not on the citizenship of the parties.

§ 639. *Where the proceedings happen to affect the interests of other persons, they may frequently be brought into court irrespective of their citizenship.*

So, too, in many instances where the jurisdiction originally depends on the citizenship of the parties, if the proceedings happen to affect the interests of other persons not original parties, the latter may often be brought before the court and made parties irrespective of their citizenship. Thus, for example, if a judgment be rendered in this court between parties whose citizenship gave the jurisdiction, and if any circumstances afterwards arise entitling some third party to have such judgment modified or enjoined, he may, in many instances, maintain a bill for that purpose in this court without reference to his citizenship. This rule arises from the necessity of the case, and to prevent a failure of justice. For, since when a court has once obtained jurisdiction of a cause, it cannot suffer any other court to disturb its proceedings or interfere with property in its custody, a party aggrieved, if he could not be heard in the court where the judgment was rendered or in which the property is held, would be without redress.

This rule is illustrated by the case of *The Ohio & Mississippi R. Co. v. Fitch*, 20 Ind., 499. In that case the railroad was in the hands of a receiver appointed by this court. Fitch had obtained a judgment in a state court against the company; and he attempted to procure its satisfaction by a process of garnishment against the receiver in the court which rendered his judgment. And it was held that this could not be done; and that his only remedy was to apply to this court either for leave to sue the receiver, or for an order on the receiver to pay the judgment. Thus, as he had no remedy in a state court, he could apply for redress in this court, irrespective of his citizenship. So in the case of *Freeman v. Howe*, 24 How., 450 (§§ 255–260, *supra*), it was held that where, by virtue of mesne process of attachment issued out of a national court, the marshal levied on property not subject to the attachment, but belonging to a stranger, the stranger could not maintain replevin for the property in a state court, but must seek redress in the court which issued the process, without regard to the citizenship of the parties. In the recent case of *The Minnesota R. Co. v. The St. Paul R. Co.*, 2 Wall., 609, it was held that when a bill in

equity is necessary to have a construction of the orders, decrees and acts of a United States court, the bill is properly filed in such court, as distinguished from any state court; and that it may be entertained in such national court, even though the parties filing it would not, for want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States. That was a case in which, like the present, the property in question was in the hands of a receiver appointed by a national court. And Mr. Justice Miller, in delivering the opinion, said "that, in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of a receiver of the circuit court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties. . . . The question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of the subpoena on the defendant, and though he be a citizen of another state, if he was a party to the judgment at law."

§ 640. *General rule as to granting a hearing to strangers to a suit irrespective of citizenship.*

From the decisions above referred to and several others made by the courts of the United States, we venture to deduce the following general rule: In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no farther.

§ 641. *A bill in equity is not an incident to a suit formerly begun, when it involves the decision of new matters and between different parties.*

Now the question is, does the case at bar fall within this rule? If so, we have jurisdiction of it; otherwise, not.

So far as the question of jurisdiction is concerned, the substance of the case made by the bill is, that this court undoubtedly had jurisdiction of the original case of Vallette against The White Water Valley Canal Company, by reason of the citizenship of the parties; that this court now has the legal custody of said canal and its appurtenances, including the feeder dam in question; that the right to maintain the canal and the feeder dam and to divert the water from the complainant's lands and mills has been forfeited; that the complainant has now the right to the natural flow of the water in the stream past his lands

and mills; and that this court ought, therefore, to abate said dam, and to restrain all the defendants (including the receiver) from any longer diverting the water from its natural flow in the river.

On the case thus made on paper several points are suggested:

First. It is certain that no state court can interfere with the possession of the property in the custody of this court.

Second. It is equally certain that any attempt on the part of the complainant, Conwell, to exercise the acknowledged common law right of peaceably abating a nuisance, would, if exerted on the feeder dam in question while the same is in the custody of this court, be a contempt of its authority which might be followed by severe punishment.

Third. It is also clear that the bill proposes, not only to enforce the protection of rights and interests relating to the property in the custody of the court, but it proposes, as an indispensable prerequisite to the enforcement of those rights and interests, to litigate a new and important question—one not involved in the original suit between Vallette and The White Water Valley Canal Company—namely, whether the right to divert water from its natural flow in the stream for use of the canal has not been forfeited by the perversion of the canal from the purposes of navigation to those of machinery.

Fourth. It is furthermore certain that the bill proposes to confine the litigation of this new and important question, not to the original parties to the bill filed by Vallette, but chiefly, if not wholly, to the new parties introduced by Conwell's bill, all of whom—complainant and defendants—are citizens of Indiana; or, at least, none of whom appear to be "citizens of different states."

Fifth. It is evident that without litigation of this new and important question of forfeiture, and without a decision of it in favor of the complainant, there is nothing stated in the bill on which any relief could be decreed.

And upon all these points it seems to us that there is no difficulty touching the question of jurisdiction, except upon that relating to the forfeiture. None of the cases to which we have referred—none which we have found in the adjudication of the United States courts—go the length of holding jurisdiction of a question like this.

On the contrary, the case of *Dunn v. Clarke*, 8 Pet., 1, is strongly against the jurisdiction in the case at bar. In that case Graham, a citizen of Virginia, had recovered against Clarke and others a judgment in ejectment, in the United States circuit court for the district of Ohio. The defendants to the ejectment suit were citizens of Ohio. Graham afterwards died, and Dunn, a citizen of Ohio, became his executor. Subsequently, Clarke and his co-defendants filed a bill in equity in the same court against Dunn, to obtain a decree for the conveyance of the land in controversy, and praying an injunction of the judgment in ejectment. All the parties to this bill were citizens of Ohio, and it became a question whether the court had jurisdiction of the case. In the opinion delivered on the question it is said: "No doubt is entertained by the court, that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law. . . . Of the action at law, the circuit court had jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If Graham had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing as against him. The in-

junction bill is not considered an original bill between the same parties as at law. But if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties to the suit at law, and no jurisdiction as to them can be exercised by this or the circuit court. But as there appear to be matters of equity in the case which may be investigated by a state court, this court think it would be reasonable and just to stay all proceedings on the judgment, until the complainants have time to seek relief in a state court."

We are not aware that the authority of this case of *Dunn v. Clarke* has ever been questioned. In several respects it is very analogous to the case at bar; and it is identical with it in regard to the bringing forward of new and important matter, not involved in the original cause, to be litigated between new parties, all citizens of the same state. It decides that, so far as such new matters and new parties are concerned, the bill must be deemed "entirely new and original in the sense" which the supreme court of the United States "has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts;" and that, so far as it is to be deemed a new and original bill, there can be no jurisdiction unless the parties are citizens of different states. In the case in 8 Peters, 1, the new matter was a claim for a specific performance of an unexecuted contract for the conveyance of the land; in the present case the new matter is a claim that the right to divert the water into the canal was forfeited, and that the right to the natural flow of the water in the river has reverted to the complainant. In that case several new parties were brought before the court; in the present case there are fifteen defendants to the new bill, only two of whom were parties to the original suit. In the former case it was proposed to obtain an injunction of a judgment at law, which, having been the very matter and result of the original litigation, was in no sense new matter, and was therefore temporarily enjoined; but in the present case it is proposed to enjoin the maintenance of a feeder dam, a thing which, so far as appears, was neither directly nor indirectly involved in the original litigation. In that case the court denied all jurisdiction over the question of a conveyance of the land in controversy; and if, in the question before us, we feel bound by the authority of that case, we must decline all jurisdiction to hear and determine whether the forfeiture mentioned in the bill has been incurred, and what consequences would legally follow. Indeed the present is a stronger case against the jurisdiction of the court than was that of *Dunn v. Clarke*.

§ 642. *The possession of property by a receiver pending a suit in the federal court will not prevent the determination in the state court of the rights of other parties in the property.*

It may, however be urged that, in the last-named case, the parties had a complete remedy for a specific performance by way of a conveyance of the land in controversy, in a suit in a state court; and that here, according to the case above cited from 20 Indiana, 499, the complainant can have no remedy in any of the Indiana courts. To the truth of this latter assertion we cannot assent. In the case in 20th Indiana, the court suggest that the party aggrieved might obtain, from the national court in which the original suit was pending, leave to sue the receiver in a state court, and might then sue in a state court accord-

ingly. In the present case, if the complainant had leave to sue the receiver in a state court, it is pretty clear that he could join all the other defendants in such suit without any leave from us.

But as there may be some doubt concerning the wisdom of said suggestion of the supreme court of Indiana, we are disposed to put the reason of our decision on another ground, namely, that we see no difficulty in the way of testing, in a state court, the principal questions raised in this bill. It is true that no state court would be justified in disturbing the receiver's possession of the canal property while the original suit of Vallette against the White Water Canal Company is pending. But that possession, as a matter of litigation, is merely incidental to the main matters presented by this bill for adjudication. Those main matters, we repeat, are the questions whether there has been a transfer by the complainant of the right to use water in the canal, on condition that it be used for navigable purposes; whether that condition has been broken, and whether the right to the natural flow of the water past the lands and mills of the complainant has consequently vested in him. Let these questions be settled and the question of the possession by the receiver will be one of little moment. And can there be any doubt that these questions may all be settled by a state court without interfering with the jurisdiction of this court over the original case of *Vallette v. The White Water Valley Canal Company*? A complaint under the Indiana code of procedure to establish the complainant's rights under the alleged forfeiture, filed against the principal defendants to the present bill, would fully present all these questions; and a decree settling the question of those rights, and operating *in personam*, would not, so far as we can see, interfere at all with our jurisdiction, and would, it is presumed, be respected by this court so far as it should become our business to take any notice of them. Even should a state court in such a proceeding finally deem that the water in question ought no longer to be drawn into the canal, but, on the contrary, be permitted to take its natural course along the river, past Mr. Conwell's farms and mills, this court, on that fact being duly brought to its attention, would no doubt pursue such a course as to avoid all collision with the state courts, and would lend its aid to the promotion of justice between all the parties interested.

Thus while we deny that, so long as the original litigation is pending, any state court could operate on the possession of the property in the hands of the receiver, or even make an order to abate the feeder dam or restrain repairs on it, we do not hesitate to say that a state court might, without interfering with this court, try the question of forfeiture and settle all the rights of the complainant set forth in this bill.

Mr. Justice Davis, of the supreme court, concurs with me in this opinion. The bill is dismissed for want of jurisdiction.

MYERS *v.* DORR.

(Circuit Court for Vermont: 13 Blatchford, 22-31. 1870.)

STATEMENT OF FACTS.—Myers filed a bill against Dorr for a dissolution of a partnership and for an account. He was a citizen of Ohio and the defendant resided in Vermont. He afterwards filed an amended and supplemental bill, seeking to make the Sutherland Falls Marble Company a defendant, and requiring that company to fulfil a contract it had made to furnish marble to the firm, and charging that, colluding with Dorr, it had refused to do so since the ap-

pointment of a receiver in the case. The Marble Company appeared specially and pleaded to the jurisdiction that it was a Massachusetts corporation, and was not chartered by nor found in Vermont. There was a replication to this plea. The cause was heard as to the Marble Company.

Opinion by WOODRUFF, J.

The single question presented by the pleadings in this suit as now brought before us, is whether the facts alleged by the Sutherland Falls Marble Company in their plea are proved. The complainant has thought proper, by replying to the plea, to put its averments in issue.

§ 643. *A replication to a plea in equity admits its sufficiency in form and substance.*

The rule is elementary and is well settled, that, when a complainant in equity, instead of setting down the defendant's plea for argument to test its sufficiency, elects to reply thereto, denying the facts alleged, he admits its sufficiency both in form and substance as a defense to all the matter of the bill to which it is pleaded, and that if the facts shall, upon the proofs taken, be found established, the bill must be dismissed (Story's Eq. Pl., § 697; *Gallagher v. Roberts*, 1 Wash., 320; *Hughes v. Blake*, 6 Wheat., 453; *Rhode Island v. Massachusetts*, 14 Pet., 210, 257); and this must be done without reference to any equity arising from other facts stated in the bill. There is no occasion to discuss the evidence. The proofs taken to sustain the allegations of the plea are uncontradicted by any evidence produced on the part of the complainant. Indeed, we do not understand the counsel for the complainant to claim that those facts are not established. The plea is to the jurisdiction of the court over the defendant corporation. By replying, the complainant admits the sufficiency of the facts alleged to support the plea. The allegations of the plea are proved, that is to say, it is proved that the corporation was not organized for the sole purpose of quarrying marble in Vermont, and has property without that state; and that it has never had or adopted, or acted under, any charter granted by the legislature of that state, and is not a citizen of that state, but, on the contrary, is a corporation organized and established within and by the laws of the state of Massachusetts only.

§ 644. *A corporation has no citizenship outside the state in which it is created.*

It is quite too late to insist that the residence or citizenship of a director or stockholder of a corporation in another state than that by which it was created changes or affects its citizenship. Whatever was formerly held on that subject to the contrary, it is now well settled that a corporation can have no citizenship or inhabitancy out of the state wherein it was created; and this has become too familiar to require that we should refer to the numerous modern cases to that effect. We might, therefore, with great propriety, stop here, and say the defendant has established the plea, and is, therefore, entitled to a decree dismissing the bill. The discussion, upon the hearing, had a much broader range. The counsel for the complainant treated the hearing as if it were upon a demurrer to the plea, insisting that the facts alleged therein and proved did not show a want of jurisdiction, and that, in considering that question, the court should regard every fact alleged in the bill, which the plea does not deny, as true. What we have above said is in direct denial that the complainant is at liberty to raise any question touching the sufficiency of the plea. But if we should pursue the subject, and consider the views urged upon us, the result to the complainant must be the same.

§ 645. *Jurisdiction of United States courts over corporations.*

The defendant is a corporation created by or under the laws of the state of Massachusetts, and has no other residence or inhabitancy. The judiciary act of 1789, § 11 (1 U. S. Stat. at Large, 78), is express, that no civil suit shall be brought before a circuit or district court, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. In respect to the question of jurisdiction, a corporation is to be treated *pro hac vice* as a natural person. *Clarke v. N. J. Steam Nav. Co.*, 1 Story, 531; *Day v. Newark Ind. R. Co.*, 1 Blatch., 628. Such corporation cannot be found out of the state wherein it is created, within the meaning of the statute, and be served by or through its officers. *Pomeroy v. The N. Y. & N. H. R. Co.*, 4 Blatch., 120. To the general rule declared by the statute, see *Toland v. Sprague*, 12 Pet., 300; *Picquet v. Swan*, 5 Mason, 35; *Richmond v. Dreyfous*, 1 Sumn., 131, and the other cases cited above; and the case of *Minnesota Co. v. St. Paul Co.*, 2 Wall., 609, relied upon by the complainant as creating an exception, affirms the general rule. And yet here the Sutherland Falls Marble Company is sued and required to answer in the district of Vermont. The circuit court of that district has no jurisdiction to compel that corporation to appear and answer, and the repeated decisions of the supreme court, that no decree can be pronounced which shall affect the rights of a party who is out of the jurisdiction, show that no decree can be pronounced against this defendant. *Story v. Livingston*, 13 Pet., 359; *Coiron v. Millaudon*, 19 How., 113; *Shields v. Barrow*, 17 How., 130; *Northern Ind. R. Co. v. Mich. Cent. R. Co.*, 15 id., 233; *Barney v. Baltimore City*, 6 Wall., 280 (§§ 1221-25, *infra*).

§ 646. *A purchaser pendente lite does not become a necessary party to the suit.*

In order to sustain the jurisdiction, the counsel for the complainant insists that the Sutherland Falls Marble Company have, since this suit commenced, purchased the interest of the defendant Dorr in the contract with them; and this is claimed to be a submission to the jurisdiction, and to make them substantially parties to the suit. In the first place, the fact alleged is not proved, and we are constrained so to find, upon the evidence. In the next place, if proved, it could not affect the question. A purchaser *pendente lite* may be said to submit to the jurisdiction, but in this sense only — he purchases subject to the litigation; but the litigation may proceed without noticing his purchase, and he does not, by such purchase, become a necessary party. If the court have not jurisdiction of him, he cannot be compelled to come in as a party. And, once more, it is claimed to be essential to the rights of the complainant, and to the protection of the business now in the hands of the receiver, and its successful prosecution, that the complainant should have the relief against the Marble Company sought by the supplemental bill. A short answer might be given to this. The complainant or the receiver must seek that relief in a court having jurisdiction of the party against whom it is sought. The circumstance that such relief would be beneficial to the parties, and prevent incidental loss to them, pending the prosecution of the original bill, will not warrant or create any extension of the power of the court.

§ 647. *When in a suit for the dissolution of a partnership a supplemental bill was filed bringing in a third party and seeking from him the specific performance of a contract, this was not a supplemental proceeding of which the court had jurisdiction irrespective of citizenship.*

We forbear to remark upon the extraordinary character of the whole case

now before us, in which a complainant who has commenced a suit to dissolve a copartnership and adjust its affairs with his partner, seeks, by what he calls a supplemental bill, to compel a third party, who has no interest in the copartnership, specifically to perform an agreement made with the firm; and that is just what is sought against this defendant. As to him the bill is, in every just sense, an original bill. If the complainant can maintain such a suit upon the contract in question, he must prosecute it where the court has jurisdiction, and the attempt to unite it with a controversy with his partner touching their copartnership affairs cannot avail anything. And so, also, the receiver of the copartnership property, if, in virtue of his receivership, he can sue on the contract, or if he can maintain a suit for its specific performance, must prosecute it elsewhere. Arguing that it is important that this court should have jurisdiction of this defendant, in order to do full justice and protect all parties, will not avail to confer jurisdiction where the limitation imposed by statute and settled by adjudication forbids its exercise.

We have referred to the nature of the suit for the purpose of adding that the case of *Minnesota Co. v. St Paul Co.*, 2 Wallace, 609, touches no question here discussed. There a suit was rightly brought and was decided, the court having jurisdiction of the parties, a decree was made, it was found that certain orders made in execution of the decree were invalid by reason of a change in the jurisdiction of the court, and that further adjudication was necessary in order to the execution of the decree and the disposal of the property in the hands of the receiver, and it was held that a bill supplemental in its nature, filed in order to carry the prior decree into execution and administer the property, was to be regarded, not as an original suit, but as a continuation of the former suit, and that, as no other court could execute that decree and make due administration of the property, the power of the court to act was not impaired by the fact that persons who had acquired interests in the property or questions were citizens of the same state as the complainant in such last-named bill; and the court refer to cases in which a person acquiring rights as purchaser under a decree is regarded as a party having a right to proceed in continuation of the suit, so far as to protect his rights, irrespective of any question touching his citizenship. In a recent case (*Jones v. Andrews*, 10 Wallace, 327; §§ 883–886, *infra*), the supreme court have gone so far as to hold, that, where a judgment has been recovered in a suit in the circuit court, and the judgment creditor is proceeding in that court, by the process of garnishment, against an alleged debtor of the defendant in the judgment, such debtor may file a bill supplemental or ancillary to his defense, to protect himself against a compulsory proceeding duly instituted to compel him to pay, showing by such bill a just and equitable defense; and the necessity of making the creditor not residing in the district a party will not defeat such ancillary suit. And in *Freeman v. Howe*, 24 How., 450 (§§ 255–260, *supra*), where a suit had been duly commenced in the federal court by attachment of property, and while the same was in the possession of the marshal, it was taken from him by process of replevin issued by the state court at the suit of a third party, the court not only held that such interference with the custody of the marshal was illegal, but declare that a bill of equity might, in such case, be filed by the plaintiff in the federal court, against the plaintiff in the replevin suit, notwithstanding both were citizens of the same state. These cases proceed upon the ground, that, where the federal court is proceeding in the due exercise of its jurisdiction, it has power to regulate and control its own judgments, and carry them into ex-

ecution, and power to maintain its own jurisdiction, and protect either plaintiff or defendant therein, in respect of the subject-matter thus lawfully within its jurisdiction, and, by an ancillary suit, to call in parties for those purposes, whether their citizenship would have authorized an original suit against them by the plaintiff in such ancillary proceeding or not. The present is no such case. Here the original suit was for the dissolution of a copartnership, and the adjustment of the rights of the complainant and Dorr. In that the Marble Company had no interest, and they have done nothing to prevent that suit from proceeding to its termination according to its intent and purpose. The cause of action against the Marble Company is its refusal to perform a contract made with the firm, and the decree sought is the specific performance of that contract. To grant the relief might be useful to the parties to the original bill, but it has no legal connection with the cause of action therein, and is in no sense necessary to the full exercise of the jurisdiction of the court. It is not in any sense a continuation of the original suit, but an attempt to add a new cause of action against a new party.

This bill must be dismissed as to the defendants, the Sutherland Falls Marble Company, with costs.

WINTER *v.* SWINBURNE.

(Circuit Court for Wisconsin: 8 Federal Reporter, 49-57. 1881.)

Opinion by DYER, D. J.

STATEMENT OF FACTS.—In effect this is an application for an attachment of certain of the defendants for contempt, because of their refusal to submit to examination, on oath, before a master, pursuant to an interlocutory decree heretofore entered in this cause.

It appears that in 1880 a money decree was recovered against the defendants for the sum of \$2,148.71, in the district court of the United States for this district, in a cause of collision in admiralty, wherein the present complainant was libellant and the defendants were respondents. There was no appeal to the circuit court and the decree in the district court became final. Execution was issued thereon and was returned *nulla bona*. Thereupon the libellant in that case and complainant here filed the present creditors' bill in the circuit court to reach assets, effects and equitable interests of the defendants in satisfaction of the decree in the district court. The defendants not appearing, the usual orders were duly entered, referring the case to a master to appoint a receiver of the property, things in action and effects of the defendants, and requiring the defendants to make conveyances to the receiver, and to submit to examination on oath before the master. On the return day of the master's summons the defendants appeared specially, and by their counsel objected to the proceedings as not within the jurisdiction of the court, and declined to be sworn and examined. Whereupon the record was certified to the court for its action thereon, and argument has been had on the question of jurisdiction.

The grounds of objection to jurisdiction are that both the complainant and the defendants are citizens of this state, and that therefore this suit cannot be maintained in this court. The precise question is, Can a creditors' bill be prosecuted in the circuit court in aid of an execution on a money decree recovered in the district court in admiralty, or for enforcement or collection of such a decree, all the parties to the bill being citizens of the same state? The question is a novel one, and no decided case covering the precise point involved has been found.

§ 648. *A creditors' bill cannot be filed in the circuit court in aid of a decree in admiralty rendered in the district court, all parties being citizens of the same state. Authorities discussed.*

It is first contended by counsel for the complainant that jurisdiction may be derived from the subject-matter of the controversy, irrespective of the citizenship of the parties. This is upon the theory that the creditors' bill is ancillary to the decree or judgment in the district court and a continuation of that proceeding, and that therefore the case is within the rule or principle laid down by the authorities, that where a bill filed on the equity side of the court is not an original suit, but ancillary and dependent, jurisdiction is maintained without regard to the citizenship of the parties. I have always supposed that this principle was only applicable where the ancillary bill was filed in the same court in which the original suit was brought, and it may not be unprofitable to notice with some care the authorities bearing on the question, most of which were cited on the argument.

In *Freeman v. Howe*, 24 How., 450 (§§ 255–260, *supra*), it was held that where property of A. is wrongfully seized under a writ of attachment against B., a petition for relief by the rightful owner may be heard and relief granted without regard to the citizenship of the parties. The court say that “the principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in *the same court*, . . . is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.”

In *Railroad Companies v. Chamberlain*, 6 Wall., 748, a bill was filed by a Wisconsin railroad company to set aside a judgment and a lease to secure the same, and another railroad corporation of the same state having become the equitable owner of the lease, was admitted as defendant, and also filed a cross-bill to have the judgment enforced. The circuit court dismissed the cross-bill for want of jurisdiction, the parties being all citizens of the same state; and it was held that this decree was erroneous, the proceeding being merely ancillary to the judgment which was recovered in the same court as that in which the cross-bill was filed; and Justice Nelson, in the opinion, observes that the bill could be filed in no other court. In *Jones v. Andrews*, 10 Wall., 327 (§§ 883–886, *infra*), it was held that a bill for an injunction to restrain proceedings of garnishment against the complainant's property, instituted in the circuit court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties, but on the cognizance of the original case.

If a judgment at law be recovered in a circuit court, the defendant in the judgment may file a bill in that court to enjoin the judgment against the representative of the plaintiff in the judgment, though that representative be a citizen of the same state as the defendant in the judgment; it is but a continuation, in substance, of the original suit. *Dunn v. Clarke*, 8 Pet., 1. A creditors' bill is held to be a mere continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law; and since, therefore, it is not an original suit, but rather the extension of a former controversy, a change of residence of the plaintiff to the state where the defendant resides will not affect the jurisdiction of the court. *Hatch v. Dorr*, 4 McL., 112 (§§ 636, 637, *supra*). See, also, *Hatfield v. Bushnell*, 1 Blatch., 393.

In all the cases thus far cited it will be observed that jurisdiction was supported on the ground that the suit in which the question of jurisdiction arose was auxiliary or supplementary to the original suit, and it is further observable of the cases that, without exception, both suits were brought in the same court. Other authorities, showing when creditors' bills, cross-bills, bills of review, and other dependent or auxiliary suits may be maintained between citizens of the same state, are collected and cited by the learned judge of the eastern district of Michigan in *In re Sabin*, 18 N. B. R., 151.

On the argument, attention was called to *Noyes v. Willard*, 1 Woods, 187, which was a case where an assignee in bankruptcy recovered a fraudulent judgment in the district court against an alleged debtor of the bankrupt, and the judgment debtor filed a bill in the circuit court to enjoin execution upon the judgment; and it was held that the fact that all the parties were citizens of the same state did not oust the court of jurisdiction. But I do not regard this case as sustaining the argument in favor of jurisdiction in the case at bar; because, in the case cited, the jurisdiction of the circuit court was clearly maintainable under that provision of the bankrupt law which expressly gives to circuit courts concurrent jurisdiction with the district courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or right of property of the bankrupt transferable to or vested in the assignee, and it was by virtue of this provision of the law that the jurisdiction was maintained.

United States v. Stiner, 8 Blatch., 544, is also cited. This was a creditors' bill filed in the circuit court and founded on a judgment recovered by the United States in the district court, and the question was whether the circuit court had jurisdiction of the case. It was held without hesitation by Judge Blatchford that jurisdiction was plainly conferred by the eleventh section of the act of September 24, 1789 (1 St. at Large, 78), which gave to the circuit courts original cognizance of all suits of a civil nature at law or in equity where the matter in dispute exceeded, exclusive of costs, \$500, and in which the United States were plaintiffs. Nothing could be clearer than that under this express statutory authority, a creditors' bill could be prosecuted by the United States in the circuit court to enforce payment of the judgment recovered in the district court.

§ 649. *Interrelations of the circuit and district courts.*

Since direct adjudication of the precise question involved is wanting, we are left to deal with it in the light of such general principles as may be applicable. And, *first*, it may be remarked that the circuit court has no general supervisory jurisdiction over the proceedings of the district court in admiralty. Its exercise of any supervisory control whatever is limited to the case of an appeal or other equivalent and direct mode of procedure where in a particular controversy it is made the subject of review. In other words, a general jurisdiction of the sort invoked here cannot be borrowed by the circuit court from the inferior court on the ground that the original proceeding in the latter court was one in admiralty. The final judgment in the district court was a judgment *in personam*, and became a simple money demand, enforceable as such by suitable proceedings in a court having authority to entertain such methods of procedure as the case might require. The circuit and district courts of the United States are distinct and separate courts, each having, so to speak, its own sphere of jurisdiction. In some classes of cases their jurisdiction is by statute made concur-

rent; otherwise, it is as distinct as is the subject-matter of the controversies with which they may have to deal. As we have seen from the authorities, the theory of ancillary bills, except as special statutes may govern particular cases, presupposes an original action in the same court in which the ancillary bill is filed. It was asked on the argument if the circuit court had only common law jurisdiction; and if, as part of the federal judicial system, there was a separate court having only chancery jurisdiction, whether the latter court might not entertain a creditor's bill to enforce a judgment recovered in the court of law. Undoubtedly, that would depend upon the constitutional and statutory authority conferred upon the court having exclusive chancery powers.

But as a more effectual test, suppose, for example, the case in the district court, upon which the present bill is based, had been one between two citizens of Michigan, and there had been an appeal to the circuit court, followed by affirmance of the judgment of the district court. Could it be claimed that the libellant could file a creditor's bill, in the circuit court of Michigan, to enforce satisfaction of the judgment or decree in the circuit court of Wisconsin? Obviously not; and yet the jurisdiction of circuit courts of different circuits is scarcely more distinct than that of the circuit and district courts of the same district. The fact that the same judge may hold both the circuit and district courts does not, of course, make them the same court, nor give them any nearer connection than they would have if held by different judges in different localities in the same district; and therefore it will not do to say that the judgment of the district court was the judgment of a federal court, and that the present bill filed in the circuit court is a bill pending in a federal court, and so that the two proceedings are in the same court. The two courts, it is true, exist under one system, but they are none the less distinct and separate courts in the exercise of their respective powers and jurisdictions. Indispensable to the exercise of original jurisdiction by the circuit courts, except in certain enumerated cases, is the requisite citizenship of the parties; and the argument, *ab inconvenienti*, strongly as it was urged by counsel, is not sufficiently potent to overcome the fact that, in view of the considerations already suggested, the present bill must be regarded as an original bill in the circuit court, and that the jurisdiction of that court is absolutely dependent upon such citizenship of the parties as does not exist here.

A good deal of stress was laid by counsel on the language used by Judge Blatchford in his opinion in the case of *The Blanche Page*, 16 Blatchf., 6, wherein he held that a court of admiralty of the United States has no power to enforce a final decree for the payment of money, against sureties, by the sequestration of their property according to the practice of courts of equity. In his opinion the learned judge says: "There is no statute which confers on a court of admiralty of the United States those powers of sequestering property which appertain to a court of equity, nor is there any rule which does so. The libellants have judgments, and, after executions have been issued and returned unsatisfied, they *can resort to the proper court* to reach any property which the debtors may have. But this court, sitting in admiralty, is not such court. The fact that the libellants could not recover judgments on the stipulations or bonds in any other court than the admiralty court does not prevent their *resorting to other courts*, where they have obtained judgments in the admiralty court, to enforce such judgments."

From this language the inference is drawn that by "resort to the proper court" was meant by the judge resort to the proper federal court, *i. e.*, the cir-

cuit court. But the language of the opinion does not, I think, warrant that conclusion. Its meaning simply is that proceedings in such a case to reach the property of the debtors must be taken in the proper court; whether it be the state court or the federal court must necessarily depend upon jurisdictional right.

§ 650. *A decree of the district court is not a matter "arising under the constitution or laws of the United States."* *Authorities.*

But it is further urged that jurisdiction of the present bill may be derived from the first clause of the first section of the removal act of March 3, 1875, which provides that: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States."

The argument is that the matter in dispute here arises under the constitution and laws of the United States; that the decree in admiralty, which is the foundation of this suit, is the creature of the federal laws and constitution, and that as this is a suit in equity for enforcement of such a decree, it is a suit within the meaning of the provision of the statute above quoted. I cannot concur in this view, and do not think it is supported by the adjudged cases bearing on the point. To uphold jurisdiction under the clause referred to in the act of 1875, I am of the opinion that it is not sufficient for the party merely to trace title or right through undisputed proceedings which may have been previously had by virtue of laws of the United States. The construction of the constitution or of a federal statute must be involved, or the right to present relief must be based upon the constitution or a statute to make a case arising under the constitution or laws of the United States within the meaning of the act. Here there is no dispute over the original suit in admiralty. The decree in that suit and the complainants' right to it are admitted: they are not even sought to be avoided; and, upon the point under consideration, there is analogy between the present case and *Ex parte Smith*, 94 U. S., 455 (§ 169, *supra*). In that case certain parties brought an action of ejectment in the federal court of Tennessee. The plaintiffs claimed title through certain proceedings under which the lands in suit were sold by the United States tax commissioners, by virtue of an act of congress providing for the collection of direct taxes in insurrectionary districts. All the parties to the suit were citizens of Tennessee, and jurisdiction was claimed on account of the subject-matter of the action; but the supreme court held that, to sustain the jurisdiction, it was incumbent on the plaintiffs to show that the action arose under the revenue laws of the United States, and that this was not shown by merely claiming a title through such laws when the title *in that respect* was not disputed.

The subject is also discussed in *Hartell v. Tilghman*, 99 U. S., 547 (§§ 1534-37, *infra*), where it was held that suits between citizens of the same state cannot be sustained in the circuit court, as arising under the patent laws, where the defendant admits the validity and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. In analogy to what is said by the court in that case, it may be said of the case at bar, that the relief sought by the present bill is not founded on nor does it arise from the laws of the United States authorizing or regulating proceedings in admiralty. There is no controversy here that requires for its decision a reference to those laws or a construction of them. There is

no denial of the force or validity of the decree in the district court, nor of complainant's right to that decree. In no phase of the case is any federal question involved, and therefore if this were a cause pending in the state court it could not be removed from the court of last resort of the state to the supreme court of the United States. *Bolling v. Lersner*, 91 U. S., 594.

But it is supposed that *Seymour v. The Phillips & Colby Const. Co.*, 7 Biss., 460 (§§ 1515-18, *infra*), is an authority which supports jurisdiction in the case at bar, under the act of 1875. I think, however, the cases are distinguishable, although my first impression was otherwise. In the case cited the facts were that the plaintiffs recovered a judgment in the circuit court against the construction company, and thereupon the defendant in that case sued out a writ of error to the supreme court and gave a *supersedeas* bond, to which the defendants in the case decided were parties as obligors. The writ of error was dismissed, and the judgment of the court below in the first case was affirmed. Thereupon a suit was brought upon the bond (which is the case cited), and the defendants pleaded to the jurisdiction of the court on the ground that all the parties were citizens of the state of Illinois. Judge Drummond held that the dispute was one arising under the laws of the United States, within the act of March 3, 1875, and sustained the jurisdiction. It is noticeable, first, of this case, that the original action against the construction company, and the suit on the *supersedeas* bond, were both brought in the circuit court; and from remarks of the learned judge in the opinion, it is evident he was inclined to the view that the latter suit was but an incident to the original; that they were inseparably connected together; and that on that ground jurisdiction was maintainable as in the ordinary case of a purely ancillary action. But, going further, the judge says that the bond sued on was a security given under a statute of the United States and a rule of the supreme court, and therefore that the damages and costs to be recovered in a suit on the bond must be determined by a construction of the statute, because the statute fixed the measure of the damages and governed the rights of the parties. So, unlike the case at bar, the cause of action and the measure of recovery, in the suit on the *supersedeas* bond, were directly grounded on a federal statute, and whatever questions might arise would, *ex necessitate*, be questions arising under a law of the United States, and to be determined with the law and the rules of the supreme court as the basis of whatever judgment might be rendered. And Judge Drummond, as a test, puts this question: "Is it not . . . manifest that if a state court took jurisdiction of such a controversy, it might ultimately, under law or under the rule, be carried to the supreme court of the United States?"

Certainly the distinction is a plain one between that case and the one in hand, when the particular features of the two cases are considered. Here is a creditors' bill—an original bill in this court—raising no question as to the validity of the decree in the district court, involving no construction of any federal statute or of any rule of court, nor the exercise of any power having its source in any such statute or rule, and presenting no controversy or question which would make the case removable ultimately to the supreme court.

The want of analogy between the two cases, it seems to me, is made even more apparent by further language used by Judge Drummond in his opinion. He says, speaking of the bond: "It is an indemnity given in pursuance of a law of the United States: the measure of the liability of the party, and the rights, both of the plaintiffs and the defendants, depend upon a law of the

United States, and a rule of the supreme court of the United States. It is impossible to take a step in the progress of the cause, in order to determine the rights of the parties, without looking at the law and the rule as the guidance of the court, and controlling its judgment in the determination of the case."

Not so with the case at bar; and, on the whole, without further discussion of the question, I am of the opinion that the jurisdiction of this court over the present bill cannot be maintained on either of the grounds urged by the learned counsel for the complainant, and, therefore, that the present proceeding in the nature of a motion for an attachment for contempt cannot be entertained.

§ 651. **Bill of revivor.**—The residence of the parties to a bill of revivor is immaterial, if the residence of the parties to the original bill is such as to confer jurisdiction. *Whyte v. Gibbes*, 20 How., 541.

§ 652. When a cross-bill is necessary to the defense of a defendant in equity, he may file it in a federal court, though some of the defendants to the cross-bill are of the same state as the plaintiff, provided they are all parties to the original bill. *Schenck v. Peay*,* 10 Int. Rev. Rec., 54.

§ 653. An injunction bill against a judgment obtained at law is not, as between the parties or their representatives, an original bill; but if other parties and different interests are involved, it is, to that extent at least, an original bill, and the jurisdiction of the federal court will depend upon the citizenship of the parties. *Dunn v. Clarke*,* 8 Pet., 1.

§ 654. A bill in equity to obtain an injunction against a judgment given in the United States circuit court is so far incidental to the original judgment that it may be brought in the circuit court where the judgment was given, although the defendant to the bill does not reside or is not found in that district. *Dunlap v. Stetson*, 4 Mason, 360.

§ 655. Although a bill by a defendant in a judgment at law, to restrain the plaintiff from proceeding on the judgment, is auxiliary to the judgment and does not depend on the citizenship of the parties, yet a bill by the plaintiff, introducing new parties defendant, is a new matter, and must allege proper citizenship in the parties, or it will be dismissed. *Williams v. Byrne*,* Hemp., 473.

§ 656. A bill for an injunction by one of the parties to a judgment at law against the other is deemed auxiliary to the original suit, but such a bill brought by a stranger to the judgment is in itself an original bill, and the federal court has no jurisdiction unless conferred by the citizenship of the parties. *Ibid.*

§ 657. **Bill to set aside a judgment.**—The United States circuit court has jurisdiction of a bill in equity filed by the defendant in a judgment rendered therein against an assignee of the judgment plaintiff, to set aside the judgment for fraud, though such assignee and the complainant be citizens of the same state; such a proceeding is in substance a continuation of the original suit. *O'Brien County v. Brown*, 1 Dill., 588.

§ 658. — **by stranger.**—A bill stating that the complainant had an interest in a former suit, and that he had petitioned to be made a party but was refused, and praying that the decree in such suit be set aside as in fraud of the rights of the present complainant, is an original bill and not a bill of review, and the federal court cannot take jurisdiction unless conferred by the citizenship of the parties. *Wickliffe v. Eve*,* 17 How., 468.

§ 659. **Injunction against suit at law in same court.**—When a bill in equity is brought in the United States circuit court, praying an injunction to restrain a suit at law in the same court, the court takes jurisdiction of the bill as ancillary to the suit at law, and without regard to the citizenship of the parties. *St. Luke's Hospital v. Barclay*, 3 Blatch., 262.

§ 660. **Ancillary suit to enforce judgment.**—The federal courts have jurisdiction, irrespective of the citizenship of the parties, of a bill filed for the purpose of enforcing a judgment obtained in the circuit court, and which is ancillary to and dependent on the original suit. *Railroad Cos. v. Chamberlain*, 6 Wall., 748.

§ 661. **Creditors' bill where judgment is in state court.**—A creditors' bill to compel a railroad company to collect sufficient subscriptions of its stock to satisfy a judgment against it, may, if the citizenship of the parties is such as to allow it, be maintained in the United States circuit court, although the judgment was recovered in the state court of the state in which the district of the circuit court lies. The fact that the creditors' bill is ancillary to the judgment does not oust the jurisdiction of the federal court. *Putnam v. New Albany*, 4 Biss., 368.

§ 662. **Mandamus in aid of a judgment.**—The circuit court of the United States has jurisdiction to issue a *mandamus* to county officers compelling them to levy a tax to satisfy a

judgment obtained by a citizen of another state against the county. If the officers oppose the motion for a *mandamus* on grounds which show a refusal to comply with the writ, if issued, it may be made peremptory. *Board of Commissioners of Knox County v. Aspinwall*, 24 How., 382.

§ 663. The circuit court of the United States may issue a *mandamus* to a county to levy a tax to satisfy a judgment recovered against it on its bonds, and an injunction of a state court is no defense to the county for not levying that tax. *Weber v. Lee County*, 6 Wall., 210 (BONDS, § 1619).

§ 664. A county issued bonds to aid the construction of a railroad, and authorized the imposition of a special tax to make a fund for the payment of the bonds. One of the holders of the bonds obtained judgment in the United States circuit court, and obtained a *mandamus* to the county officers to compel them to collect enough of the tax to pay his judgment. A taxpayer obtained in a state court an injunction to restrain the collection of the tax. The county officers returned, to the *mandamus*, that they were so enjoined. The circuit court held the return valid. On error to the supreme court this judgment was reversed, and it was held that the circuit court has the power, as ancillary to its judgment, and to enforce its judgment, to issue the *mandamus*, and compel obedience to it. *Riggs v. Johnson County*, 6 Wall., 184.

§ 665. **Suits ancillary to foreclosure.**—When, in a foreclosure suit, instituted in a federal court by reason of the citizenship of parties, the property is ordered into the hands of a receiver, all ancillary suits affecting that property may be maintained in that federal court without respect to the citizenship of the parties. *Minnesota Co. v. St. Paul Co.*, 2 Wall., 609.

§ 666. When a trustee under a mortgage deed given by a railroad corporation to secure its indebtedness has brought the road into the United States circuit court on a bill to foreclose, and that court has jurisdiction of the case, and takes the subject-matter of the suit into its power, that court is the proper one for any subsequent proceedings, and no state court can take jurisdiction of the same subject. *Bill v. New Albany, etc., R. Co.*, 2 Biss., 399.

§ 667. **Suit against sheriff and sureties—Reimbursement among latter.**—A suit was brought by a non-resident in the circuit court for Virginia, against a deputy sheriff who was insolvent, including as parties defendant the sureties of the deputy, and also the high sheriff and his sureties. The only defendant who was able to satisfy the plaintiff's demand was one of the sureties of the high sheriff, and his lands were sold for this purpose. Before the termination of the cause one of the sureties of the deputy became solvent, and the surety of the high sheriff whose lands had been sold, petitioned that the now solvent surety of the deputy be made to reimburse him. *Held*, that the federal court from its equity power to carry through a suit begun so as to effect justice, had power to grant the petition, though petitioner and respondent were citizens of the same state. *Howard v. Selden*,* 5 Fed. R., 465; 4 Hughes, 300.

§ 668. **Bill seeking subrogation, not ancillary.**—A creditor of an insolvent debtor, instead of proceeding against the sureties on the debt, brought a bill in the federal court asking to be subrogated to the rights of the sureties and to enforce a lien of the latter upon a note of a third party belonging to the principal. All the parties were citizens of the same state, but it was claimed that the proceeding was ancillary to a suit at law then pending in the same court to recover the contents of the note in question. *Held*, that the case in this bill was wholly outside of the litigation in the suit at law, and that the bill was essentially an original one. *Christmas v. Russell*,* 14 Wall., 69.

§ 669. A bill for an injunction against garnishment proceedings is a supplementary suit, and the court has jurisdiction, irrespective of citizenship. *Jones v. Andrews*, 10 Wall., 327 (§§ 883-886).

§ 670. **Suit held not to be a continuation of a former one.**—Upon the breach of a contract relating to real estate, a suit was brought in a state court for strict foreclosure of the contract, and a decree rendered for plaintiffs. A year later the same parties plaintiff brought suit to foreclose their liens upon the property, joining the former defendants and also other parties, as subsequent incumbrancers, against whom it was sought to extend the former decree. *Held*, that this was not a continuation of the former suit, giving the court exclusive jurisdiction of the subject-matter, and ousting the jurisdiction of the federal court in a suit brought there in the interval of time. *Hubbard v. Bellew*,* 3 Fed. R., 447.

§ 671. **Proceeding against surety on forthcoming bond.**—According to Louisiana practice, adopted by the federal court, the court proceeds against a surety on a forthcoming bond by a rule to show cause. The proceeding is merely incidental to the original suit and the jurisdiction does not depend upon the citizenship of the parties. *Reilly v. Golding*,* 10 Wall., 56.

§ 672. **Suit for infringement—Auxiliary proceedings.**—The circuit court of the United States has jurisdiction of a case of infringement of a patent right. After thus taking jurisdiction, it may, as auxiliary, settle matters which would not constitute a basis for original jurisdiction. *Brooks v. Stolley*, 3 McL., 525.

§ 673. **Suit against marshal incidental to main case.**— In all cases where the courts of the United States have original jurisdiction, whether from the character of the claim or the citizenship of the parties, any proceeding against the marshal incidental to the main case is within the jurisdiction of the court. So held where the marshal allowed a boat, seized in an admiralty suit, to proceed on her voyage, on which she was lost, and the marshal was sued on his bond. *Wetmore v. Rice*, 1 Biss., 239 (BONDS, §§ 314-316).

§ 674. **Proceedings ancillary to admiralty suit.**— If a suit is brought in an admiralty court by the owners of a vessel against the captain to recover damages which they have been compelled to pay the owners of another vessel which was illegally captured by him as prize, the suit is so dependent upon and ancillary to the suit by which the owners were compelled to pay the damages, that, that being in admiralty, the second will also be in admiralty. *Dean v. Angus, Bee*, 370.

§ 675. **Protecting rights of strangers.**— When a federal court has acquired jurisdiction of a cause by reason of the citizenship of parties, if the rights of third parties are involved in the litigation, either as to the original judgment or property in custody of the court, or any abuse or misapplication of its process, and if such rights cannot be determined by a state court without a conflict of jurisdiction with the federal court, the latter court will protect such rights. *Barth v. Makeever*, 4 Biss., 212.

§ 676. **Death of party or change of domicile.**— A court which has once acquired jurisdiction of a suit does not lose it by a change of domicile of the parties, and may, when the suit is of such a nature that it survives, bring in the representatives or successors of a party who has died or ceased to exist without regard to their domicile. *Hemingway v. Stansell*, 16 Otto, 402.

§ 677. **Death of party — Citizenship of administrator.**— When the federal court has acquired jurisdiction of a cause which does not abate by the death of one of the parties, the jurisdiction of the court will not be affected by the citizenship of the administrator of the deceased party. *Hatfield v. Bushnell*,* 1 Blatch., 393.

6. *In Suits against Sovereign Power.*

SUMMARY — *Suits affecting the right to property held by the agents of the government*, §§ 678, 679. — *Suit in which a state is a party removed to federal court*, § 680. — *Suit against bank in which a state is a corporator*, § 681. — *Enjoining state board of liquidation*, § 682. — *Bill by United States to forfeit a lease; appointment of receivers*, § 683.

§ 678. The United States cannot be sued without its consent in any case. But it does not follow that no action can be maintained against individuals without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government. *United States v. Lee*, §§ 684-688.

§ 679. The above doctrine is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not defendant or a necessary party to the suit. *Ibid.*

§ 680. If a suit in which a state is party be removed from a state into a federal court, the latter must remand it even though it had been docketed. *New Jersey v. Babcock*, §§ 689-691.

§ 681. The fact that a state is one of the corporators of a bank does not exempt such bank from suit. *Bank of the United States v. Planters' Bank*, §§ 692, 693.

§ 682. The circuit court, in a proper case, has jurisdiction to enjoin a state board of liquidation from diverting the fund collected and set apart, under a state funding act, to pay interest on bonds, even though after the fund was collected a state law was passed to repudiate the payment of the interest and to transfer the fund to defray the expenses of the state government. *Chaffraix v. Board of Liquidation*, §§ 694-697.

§ 683. Where the United States had filed a bill against one of its tenants, praying a forfeiture of the lease, the sequestration of the rents and the appointment of a receiver, and by consent of parties a decree was rendered placing the property in possession of the United States, with certain stipulations as to the application of all rents to the payment of past dues, held, that the court lost jurisdiction to make any decree against the United States for the appointment of a receiver, the examination of the accounts of the agent in charge, or the enforcement of any claim arising from the stipulations in the decree. *United States v. Wickersham*, §§ 698-700.

[NOTES.— See §§ 701-719.]

UNITED STATES *v.* LEE.

(16 Otto, 196-251. 1882.)

ERROR to U. S. Circuit Court, Eastern District of Virginia.

Opinion by MR. JUSTICE MILLER.

These are two writs of error to the same judgment, one prosecuted by the United States *eo nomine*, and the other by the attorney-general of the United States in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the circuit court.

The action was originally commenced in the circuit court for the county of Alexandria, in the state of Virginia, by George W. P. C. Lee, against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about eleven hundred acres, known as the Arlington estate. It was in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant. As soon as the declaration was filed the case was, by writ of *certiorari*, removed into the circuit court of the United States, where all the subsequent proceedings took place. It was tried by a jury, and during its progress an order was made, at the request of the plaintiff, dismissing the suit as to all of the defendants except Kaufman and Strong. Against each of these a judgment was rendered for separate parcels of the land in controversy; namely, against Kaufman for about two hundred acres of it, constituting the national cemetery and included within its walls, and against Strong for the remainder of the tract, except seventeen acres in the possession of Maria Syphax.

As the United States was not a party to the suit below, and, while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error, under which all the questions are raised which could be raised under the other, their writ being prosecuted in the interest of the United States and argued here by the solicitor-general, the point is immaterial, and the question has not been mooted.

The first step taken in the case after it came into the circuit court of the United States was the filing in the clerk's office of that court of the following paper by the attorney-general:

“GEORGE W. P. C. LEE <i>v.</i> FREDERICK KAUFMAN, R. P. STRONG AND OTHERS.	}	In ejectment.
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“And now comes the attorney-general of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years, and now is, held, occupied and possessed by the United States, through its officers and agents charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the ‘Arlington cemetery,’ and for the uses and purposes set forth in the certificate of sale, a copy of which,

as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title as appears by the said certificate of sale, and which was executed, delivered and recorded as therein appears.

“Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

“CHAS. DEVENS,

“Att’y-Gen’l U. S.”

The plaintiff demurred to this suggestion, and on hearing the demurrer was sustained. The case was thereupon tried before a jury on the general issue pleaded by Kaufman and Strong, in the course of which the question raised by this suggestion of the attorney-general was again presented to the court by prayers for instruction, which were rejected, and exceptions taken. The plaintiff offered evidence establishing title in himself by the will of his grandfather, George Washington Parke Custis, who devised the Arlington estate to his daughter, the wife of General Robert E. Lee, for life, and after her death to the plaintiff. This, with the long possession under that title, made a *prima facie* right of recovery in the plaintiff.

The title relied on by the defendants is a tax-sale certificate made by the commissioners appointed under the act of congress of June 7, 1862, ch. 98, entitled “An act for the collection of direct taxes in the insurrectionary districts within the United States,” as amended by the act of February 6, 1863, ch. 21. At this sale the land was bid in for the United States by the commissioners, who gave a certificate of that fact, which was introduced on the trial as evidence by the defendants. If this sale was valid and the certificate conveyed a valid title, then the title of the plaintiff was thereby divested, and he could not recover. If the proceedings evidenced by the tax sale did not transfer the title, then it remained in him, and, so far as the question of title was concerned, his recovery was rightful.

We have then two questions presented to the court and jury below, and the same questions arise in this court on the record: 1. Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in the plaintiff? 2. If such an action could be maintained, was the *prima facie* title of the plaintiff divested by the tax sale and the certificate given by the commissioners?

It is believed that no division of opinion exists among the members of this court on the proposition that the rulings of law under which the latter question was submitted by the court to the jury were sound, and that the jury were authorized to find, as they evidently did find, that the tax certificate and the sale which it recited did not divest the plaintiff of his title to the property. For this reason we will consider first the assignment of errors on that subject.

No substantial objection is seen on the face of the certificate to its validity, and none has been seriously urged. It was admitted in evidence by the court, and, unless impeached by extrinsic evidence offered by the plaintiff, it defeated his title. When this tax sale was made, the act of February 6, 1863, which substitutes a new section 7 for that of the original act of June 7, 1862, was in

force. It declares that the certificate of the commissioners given to the purchaser at such sale "shall be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same;" and that it "shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act."

It is in reference to the clause which permits the certificate to be impeached by showing that the taxes had been paid previous to sale that the plaintiff in the present case introduced evidence. This court has in a series of cases established the proposition that where the commissioners refuse to receive such taxes, their action in thus preventing payment was the equivalent of payment in its effect upon the certificate of sale. *Bennett v. Hunter*, 9 Wall., 326; *Tacey v. Irwin*, 18 id., 549; *Atwood v. Weems*, 99 U. S., 183. There are exceptions to the ruling of the court on the admission of evidence, and instructions to the jury given and refused on this subject, which are made the foundation of several assignments of error.

All that is necessary to be considered in this matter is presented in the instructions granted and refused. The point in issue is fairly raised by the following, given at the request of the plaintiff and against the objection of the defendants:

"If the jury believe from the evidence that the commissioners, prior to January 11, 1864, established, announced and uniformly followed a general rule, under which they refused to receive on property which had been advertised for sale from any one but the owner, or a party in interest, in person, when offered, the amount chargeable upon said property by virtue of the said acts of congress, then said rule dispensed with the necessity of a tender, and in the absence of proof to the contrary the law presumes that said amount would have been paid, and the court instructs the jury that, upon such a state of facts, the sale of the property in controversy made on the 11th day of January, 1864, was unauthorized, and conferred no title on the purchaser;" and by instructions six and seven, given at the request of the defendants, in the following language:

"6th. The burden of proof is upon the plaintiff to establish the fact that the tax commissioners before the sale of this property made a general rule not to receive taxes except from the owner in person after the advertisement and before the sale; and if the jury believe that only two such instances occurred before the sale of this property, and if there is no evidence that the other two commissioners or either of them ever acted under such rule or practice except Commissioner Hawxhurst, or that they or either of them ever concurred in such action before the sale of this property, then the said two instances in which Mr. Hawxhurst alone acted do not establish the said practice by the board of commissioners before the sale of this property in a sufficient manner to render the certificate of sale of this property invalid.

"7th. In order to establish a general practice or rule of the board of commissioners not to receive taxes except from the owner in person, after advertisement and before sale, before the date of the sale of the property in controversy, the jury must find from evidence produced on this trial that a majority of such board adopted such practice, or rule, or concurred therein,

before the date of the sale of this property, and in the absence of proof to the contrary the law presumes that a majority of such board did not adopt such practice or rule, or concur therein before such date."

§ 684. *Where a tender of performance or payment is necessary to the establishment of a right, it will be considered as waived when it is certain that it will be refused. Cases cited.*

We think these presented correctly to the jury the principle established by the cases in this court above referred to. That is, that the commissioners themselves having established and acted upon a rule that payment of the taxes after advertisement would be received from no one but the owner of the land appearing in person to pay them, that if offered by his tenant, his agent, or his attorney in fact duly appointed, it would be rejected, it would be an idle ceremony for any of these to make the offer, and an actual tender by such persons, as it would certainly not be accepted, need not be made. That the commissioners, having in the execution of the law acted upon a rule which deprived the owner of the land of an important right, a right which went to the root of the matter, a right which has in no instance known to us or cited by counsel been refused to a tax payer, the sale made under such circumstances is invalid, as much so as if the tax had been actually paid or tendered. The proposition is thus expressed by this court at its last term in *Hills v. Exchange Bank*, 105 U. S., 319, as the result of the cases above cited: "It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

The application of these decisions to the case before us is denied by counsel on two grounds. The first of these is that *Bennett v. Hunter* was decided on the language of the act of 1862, and that due attention was not given to the peculiar language of the substituted section 7 of the act of 1863, which says that where the owner of the land "shall not, on or before the day of sale, appear in person before the said board of commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof." It is argued from this that no right to pay the tax under *this* statute existed except by the owner in person.

The reply to this is that in *Bennett v. Hunter* and *Tacey v. Irwin* the sales that were under consideration are clearly shown by the reports to have been made after the act of 1863, and it is believed that no sale for taxes was made under the original tax law until after that amendment was passed, and that all the officers charged with the duty of collecting that tax were aware of the language of the new seventh section. It is quite apparent from the opinion of Mr. Chief Justice Chase, who spoke for the court in *Bennett v. Hunter*, and who was secretary of the treasury when both statutes were enacted, that he understood well that he was deciding the very question raised by the requirement to appear in person in the latter act, and intended to decide that, notwithstanding this, the owner had a right to pay the tax before sale by an agent or a friend.

Besides, there was no other provision of either the act of 1862 or the amend-

ment of 1863, which gave the owner the right to pay at all between the advertisement and the sale. The third section of the original act gave the right to pay for sixty days after the tax commissioners had fixed the amount of the tax, and no longer; and the seventh section of that act, as well as its substitute of 1863, gave the right to redeem after the sale was made. It is clear, therefore, that *Bennett v. Hunter*, *Tacey v. Irwin*, and *Atwood v. Weems* were decisions construing the substituted seventh section of 1863.

In *Turner v. Smith*, 14 Wall., 553, this court, in construing the change in the language of the seventh section, held that its object was to authorize the United States, by its commissioners, to bid more than the tax and costs, which they could not do before, and to limit them to two-thirds of the assessed value of the land, and that after the amount of costs and tax had been bid, the United States should not bid against a purchaser named by the owner. It was probably in reference to this that the act required the personal presence of the owner before the commissioners to name a purchaser, against whom the United States should not compete after it was secured by a bid which covered the tax, interest and costs.

The other point raised is, that the right to pay the taxes between the advertisement and day of sale in any other mode than by personal appearance of the owner before the commissioners did not exist in cases where the United States became the purchaser. As it could never be known until the day of sale whether the United States would become the purchaser or not, it would seem that the duty of the commissioners to receive the taxes was to be exercised without reference to the possibility of the land being struck off to the United States.

In *Cooley v. O'Connor*, 12 Wall., 391, it was held that the act contemplated that a certificate of sale should be given when the United States became the purchaser as in other cases, and no reason is shown why that certificate should have any greater effect as evidence of title than in the case of a private purchaser, nor why it should not be subject to the same rules in determining its validity, nor why the payment or tender of the tax, interest and costs should not be made by an agent in the one case as in the other.

It is proper to observe that there was evidence, uncontradicted, to show that Fendall appeared before the commissioners in due time, and on the part of Mrs. Lee, in whom the title then was, offered to pay the taxes, interest and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person. In all this matter we do not see any error in the rulings of the court, nor any reason to doubt that the jury were justified in finding that the United States acquired no title under the tax-sale proceedings.

§ 685. *It is established law that the United States cannot be sued in any case without its consent.*

In approaching the other question which we are called on to decide, it is proper to make a clear statement of what it is. The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government. The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward the First until now the king of England was not suable in the courts of that country except where his consent had been given on petition of right, it is a matter of great uncertainty whether, prior to that time, he was not suable in his own courts and in his kingly character as other persons were. We have the authority of Chief Baron Comyns, 1 Digest, 132, Action, C., 1, and 6 Digest, 67, Prerogative; and of the Mirror of Justices, ch. 1, sec. 3, and ch. 5, sec. 1, that such was the law; and of Bracton and Lord Holt, that the king never was suable of common right. It is certain, however, that, after the establishment of the petition of right, about that time, as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the king, no attempt has been made to sue the king in any court except as allowed on such petition.

It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings as that which the law affords to the subjects of the king in legal controversies among themselves. "If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." *United States v. O'Keefe*, 11 Wall., 178.

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued, except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis*, 10 Wall., 15. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbid that the king should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. No such reason exists in our government, as process runs in the name of the president, and may be served on the attorney-general, as was done in *Chisholm v. Georgia*, 2 Dall., 419. Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment.

Mr. Justice Gray, of the supreme court of Massachusetts, in an able and learned opinion, which exhausts the sources of information on this subject, says: "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." *Briggs v. Light Boats*, 11 Allen (Mass.), 157. As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

It is obvious that in our system of jurisprudence the principle is as applicable to each of the states as it is to the United States, except in those cases where by the constitution a state of the Union may be sued in this court. *Railroad Co. v. Tennessee*, 101 U. S., 337; *Railroad Co. v. Alabama*, id., 832.

That the doctrine met with a doubtful reception in the early history of this court may be seen from the opinions of two of its justices in the case of *Chisholm v. Georgia*, where Mr. Justice Wilson, a member of the convention which framed the constitution, after a learned examination of the laws of England and other states and kingdoms, sums up the result by saying: "We see nothing against, but much in favor of, the jurisdiction of this court over the state of Georgia, a party to this cause." Mr. Chief Justice Jay also considered the question as affected by the difference between a republican state like ours and a personal sovereign, and held that there is no reason why a state should not be sued, though doubting whether the United States would be subject to the same rule.

The first recognition of the general doctrine by this court is to be found in the case of *Cohens v. Virginia*, 6 Wheat., 264 (§§ 734-745, *infra*). The terms in which Mr. Chief Justice Marshall there gives assent to the principle does not add much to its force. "The counsel for the defendant," he says, "has laid down the general proposition that a sovereign independent state is not suable except by its own consent." This general proposition, he adds, will not be controverted. And while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. *United States v. Clarke*, 8 Pet., 436; *United States v. McLemore*, 4 How., 286; *Hill v. United States*, 9 id., 386; *Nations v. Johnson*, 24 id., 195; *The Siren*, 7 Wall., 152; *The Davis*, 10 id., 15.

§ 686. *The officers and agents of the United States holding for public uses property claimed by citizens may be sued therefor, and the title of the United States to such property may be examined and adjudged in such a suit. Cases cited.*

On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants

by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

But little weight can be given to the decisions of the English courts on this branch of the subject, for two reasons: 1. In all cases where the title to property came into controversy between the crown and a subject, whether held in right of the person who was king or as representative of the nation, the petition of right presented a judicial remedy,—a remedy which this court, on full examination in a case which required it, held to be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the king who held possession of such property, when the issue could be made with the king himself as defendant. 2. Another reason of much greater weight is found in the vast difference in the essential character of the two governments as regards the source and the depositaries of power.

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government. It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Another class of cases in the English courts, in which attempts have been made to subject the public ships and other property of foreign and independent nations found within English territory to their jurisdiction, is also inapplicable to this case; for, both by the English courts and ours, it has been uniformly held that these were questions the decision of which, as it might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Schooner Exchange v. McFaddon*, 7 Cranch, 116; *Luther v. Borden*, 7 How., 1; *State of Georgia v. Stanton*, 6 Wall., 50.

The earliest case in this court in which the true rule is laid down, and which, bearing a close analogy to the one before us, seems decisive of it, is *United States v. Peters*, 5 Cranch, 115. In an admiralty proceeding commenced before the formation of the constitution, and which afterwards came into the

district court of the United States for Pennsylvania, that court, after full hearing, had decided that the libelants were entitled to the proceeds of the sale of a vessel condemned as prize of war, which had come to the possession of David Rittenhouse as treasurer of Pennsylvania. The district judge had declined to issue any process to enforce his decree against the representatives of Rittenhouse, on the ground that the funds were held as the property of that state, and that as she could not be subjected to judicial process, neither could the officer who held the money in her right. The analogy to the case before us will be seen when it is further stated that this claim of the state to the money had been fully presented, and that the court had decided that the libelants and not the state were legally entitled to it. In that case, as in this, it was argued that the suit was in reality against the state. But, on an application therefor, a writ of *mandamus* to compel the judge of the district court to proceed in the execution of his decree was granted. In delivering the opinion, Mr. Chief Justice Marshall says: "The state cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, when a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrices of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; *but it certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.*"

The case before us is a suit against Strong and Kaufman, as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.

It may be said—in fact it is said—that the present case differs from the one in 5 Cranch, because the officers who are sued assert no personal possession, but are holding as the mere agents of the United States, while the executors of Rittenhouse held the money until a better right was established. But the very next case in this court of a similar character, *Meigs v. McClung*, 9 Cranch, 11, shows that this distinction was not recognized as sound. The property sued for in that case was land on which the United States had a garrison erected at a cost of \$30,000, and the defendants were the military officers in possession; and the very question now in issue was raised by these officers, who, according to the bill of exceptions, insisted that the action could not be maintained against them, "because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction." They further insisted, says the bill of exceptions, that the United States had a right by the constitution to appropriate the property of the individual citizen. The court below overruled these objections,

and held that the title being in plaintiff he might recover, and that "if the land was private property the United States could not have intended to deprive the individual of it without making him compensation therefor."

Although the judgment of the circuit court was in favor of the plaintiff, and its result was to turn the soldiers and officers out of possession and deliver it to plaintiff, Mr. Chief Justice Marshall concludes his opinion in this emphatic language: "This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, *and that the plaintiff below might sustain his action.*" We are unable to discover any difference whatever in regard to the objection we are now considering between this case and the one before us.

Impressed by the force of this argument, counsel say that the question of the objection arising out of the possession of the United States was not considered in that case, because it was not urged in argument by counsel. But it is manifest that it was so set out in the bill of exceptions, and so much relied on in the court below, that it could not have escaped the attention of the court and of the eminent man who had only six years before delivered the opinion in the case of *United States v. Peters*. Nor could the case have been decided as it was if the doctrine now contended for be sound, since the United States was dispossessed of an occupied garrison by the effect of the judgment against the officers in charge of it.

In *Wilcox v. Jackson*, 13 Pet., 498, the contest was over a fort of the United States which had been in its continued possession for over thirty years, and was so occupied when the suit was brought against its officers to dispossess them. The case came from the supreme court of Illinois to this court on a writ of error, and the judgment in favor of the plaintiff was reversed. The question now under consideration was not passed upon directly by this court. But a long examination of the question whether the plaintiff had proved title in himself, and a decision that while the state courts of Illinois held a certificate of purchase from the United States to be a legal title under her statute, that statute was invalid, might all have been avoided by the simple declaration that the United States, being in possession of the property as a fort, no action at law against its officers could be maintained. But no such proposition was advanced by counsel on either side or considered by the court.

There is a very satisfactory reason for this. *United States v. Peters*, *Meigs v. McClung*, and *Osborn v. Bank of United States*, had all involved the same question, and in the first and last of these cases the principle was fully discussed, and in the other necessarily decided in the negative. And in *The Governor of Georgia v. Madrazo*, 1 Pet., 110, the court had referred to these cases, and again asserted the principle, quoting the language of them. Counsel were not justified in asking the court to reconsider it while most of the judges were still on the bench, including the chief justice, who had made those decisions.

Osborn v. Bank of United States, 9 Wheat., 738, is a leading case, remarkable in many respects, and in none more than in those resembling the one before us. It was this: The state of Ohio having levied a tax upon the branch of the Bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the state, was about to proceed to collect said tax by a seizure of the money of the bank in its vaults, and an amended bill alleged that he had so seized \$100,000, and while aware that an injunction had been issued by the circuit court of the United States on the prayer of the bank, the

money so seized had been delivered to the treasurer of the state, Curry, and afterwards came to the possession of Sullivan, who had succeeded Curry as treasurer. Both Curry and Sullivan were made defendants as well as Osborn and his assistant, Harper.

One of the objections pressed with pertinacity all through the case to the jurisdiction of the court was the conceded fact that the state of Ohio, though not made a defendant to the bill, was the real party in interest. That all the parties sued were her officers,—her auditor, her treasurer, and their agents,—concerning acts done in their official character and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued there, as here, that what could not be done directly could not be done by suing her officers. And it was insisted that while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction, and that the bill must be dismissed.

A few citations from the opinion of Mr. Chief Justice Marshall will show the views entertained by the court on the question thus raised. At page 842 of the long report of the case, he says: "If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

In another place he says: "The process is substantially, though not in form, against the state, . . . and the direct interest of the state in the suit as brought is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank, . . . and the very difficult question is to be decided whether, in such a case, the court may act upon agents employed by the state and on the property in their hands." In answering this question he says: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself because repugnant to the constitution, may arrest the execution of any law in the United States." Again, "the bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party." "If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person can be considered as a party who is not made so in the record." Again, "in cases where a state is a party on the rec-

ord, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the state, what rule has the constitution given by which this interest is to be measured? If no rule is given is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?" The decree of the circuit court ordering a restitution of the money was affirmed. (See CONST., §§ 2363-87.)

Grisar v. McDowell, 6 Wall., 363, was an action in the circuit court against General McDowell to recover possession of property held by him as an officer of the United States, which had been set apart and reserved for military purposes. Though this was set up by him as part of his defense, it does not appear that in the argument of counsel for the government, or in the opinion of the court, any importance was attached to this circumstance; but the opinion of Mr. Justice Field in this court examines the case elaborately on the question whether plaintiff or the government had the title to the land. If the doctrine now contended for is sound, the case should have proceeded no further on the suggestion, not denied, that the property was held for public use by a military officer under orders from the president.

Brown v. Huger, 21 How., 305, is of a precisely similar character, for the possession of the military arsenal at Harper's Ferry, in which, while the fact of its possession by the United States was set out in the bill of exceptions, no attention is given to that fact in the opinion of this court, which consists of an elaborate examination of plaintiff's title, held to be insufficient.

These decisions have never been overruled. On the contrary, as late as the case of *Davis v. Gray*, 16 Wall., 203, the case of *Osborn v. Bank of United States* is cited with approval as establishing these among other propositions: "Where the state is concerned, the state should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, *although her law may have prompted his action, and the state may stand behind him as a real party in interest*. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

Though not prepared to say now that the court can proceed against the officer in "all respects" as if the state were a party, this may be taken as intimating in a general way the views of the court at that time. *The Siren*, 7 Wall., 152, and *The Davis*, 10 id., 15, are instances where the court has held that property of the United States may be dealt with by subjecting it to maritime liens where this can be done without making the United States a party.

This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the

court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox v. Jackson*, *Brown v. Huger* and *Grisar v. McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions.

It is true that there are expressions in the opinion of the court in the case of *Carr v. United States*, 98 U. S., 433, which are relied on by counsel with much confidence as asserting a different doctrine. That was a case in which the United States had filed a bill in the circuit court for the district of California to quiet title to the land on which a marine hospital had been built. To rebut the evidence of title offered by the plaintiffs, the defendant had relied on certain judgments rendered in the state courts, in which the unsuccessful parties set up title in the United States, under which they claimed. It appeared that the person who was district attorney of the United States had defended these actions, and the question under discussion was whether the United States was estopped by the proceedings so as to be unable to sustain the suit to quiet title. After stating the general doctrine that the United States cannot be sued without her consent, and the further proposition that no such consent can be given except by congress, which is a sufficient reason why they cannot be concluded by an action to which they are not parties, the learned justice who delivered the opinion proceeded to make some remarks as to cases in which actions would or would not lie against officers of the government in relation to property of the United States in their possession. As these remarks were not necessary to the decision of the point then in question, as the action was equally inconclusive against the United States, whether the persons sued were officers of the government or not, these remarks, if they have the meaning which counsel attribute to them, must rest for their weight as authority on the high character of the judge who delivered them, and not on that of the court which decided the case.

That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided. The fact that the property which is the subject of this controversy is devoted to public uses is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, and invasions of forts and arsenals of the United States. Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

The cases already cited of *Meigs v. McClung*, *Wilcox v. Jackson*, *Georgia v. Madrazo*, *Grisar v. McDowell*, *Brown v. Huger*, and *Osborn v. Bank of United States*, necessarily involved this question, for the property recovered by the plaintiff in the case of *Meigs v. McClung* was a garrison and barracks then in

use for such purposes by the officers of the United States who were sued. In *Wilcox v. Jackson* an action was brought to recover, among other things, a fort which had been in the occupation of the United States for thirty years, and which was then occupied by an officer of the army of the United States and his command. In *Osborn v. Bank of United States*, the money sued for and recovered by the final decree of this court was claimed by the state of Ohio as part of her public funds, and devoted by her laws to public uses in all the exigencies of the public service; so that the authorities we have examined, if they are worth anything, meet this objection as they meet the others which we have considered.

§ 687. *That no person shall be deprived of life, liberty or property without due process of law is a provision of the constitution, the enforcement of which is especially within the province of the judiciary.*

The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: "That no person . . . shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government *Ex parte Milligan*, 4 Wall., 2.

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?

Looking at the question upon principle and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully pos-

sessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court,—a *case* within the meaning of that term, as employed in the constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the president, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the president had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex parte Milligan*, 4 Wall., 2; *Kilbourn v. Thompson*, 103 U. S., 168.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of congress and approved by the president to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized

and converted to the use of the government without lawful authority, without process of law, and without compensation, because the president has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here; I hold by order of the president, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the secretary of war, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations. One of these, of no little significance, is, that during the existence of the government for now nearly a century under the present constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars, so serious as to call into exercise all the powers and all the resources of the government, have been conducted to a successful issue. One of these was a great civil war, such as the world has seldom known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens, in order to cripple the exercise of the authority necessary to put down the rebellion; yet no improper interference with the exercise of that authority was permitted or attempted by the courts. *State of Mississippi v. Johnson*, 4 Wall., 475; *State of Georgia v. Stanton*, 6 id., 50; *State of Georgia v. Grant*, id., 241; *Ex parte Tarble*, 13 id., 397.

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr v. United States*, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes

to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding in which a just compensation shall be ascertained and paid according to the constitution.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions, to hostile proceedings in the state courts, the answer is that no case can arise in a state court, where the interests, the property, the rights or the authority of the federal government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the federal government.

The slightest consideration of the nature, the character, the organization and the powers of these courts will dispel any fear of serious injury to the government at their hands. While by the constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all.

Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guarantied by the constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well founded fear can be entertained of injustice to the government or of a purpose to obstruct or diminish its just authority.

The circuit court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is affirmed. (a)

WAITE, C. J., and JUSTICES GRAY, BRADLEY and WOODS dissented.

Dissenting opinion by MR. JUSTICE GRAY.

The Chief Justice, Mr. Justice Bradley, Mr. Justice Woods and myself are unable to concur in the judgment of the majority of the court. The case so deeply affects the sovereignty of the United States, and its relations to the citizen, that it is fit to announce the grounds of our dissent.

The action is ejectment, originally brought by George W. P. C. Lee against Frederick Kaufman and Richard P. Strong in a court of the state of Virginia, to recover possession of a tract of land known as Arlington, of which the plaintiff alleged that he was seized in fee. The whole tract, having been advertised for sale for non-payment of direct taxes lawfully assessed upon it, and having been selected for government use for war, military, charitable and educational purposes by the president of the United States under the power conferred on him by the act of congress of February 6, 1863, ch. 21, was accordingly, in 1864, bid off to the United States at the tax sale; and for many years has been, and now is, held and occupied by the United States, through Kaufman and Strong in charge thereof, under the certificate of sale of the tax commissioners, and for the purposes aforesaid, and also under orders of the secretary

(a) Affirming *The Arlington Case*,* 3 Hughes, 36.

of war, part of it for a military station, and the rest as a national cemetery for the burial of deceased soldiers and sailors. These facts were made to appear at three stages of the case.

First. They were stated in a petition filed by Kaufman and Strong in the state court, for the removal of the case into the circuit court of the United States, under section 643 of the Revised Statutes, on the ground that the defendants were officers of the United States, and holding the land by title derived from officers of the United States, acting under a revenue law of the United States, the validity of which was affected. That petition was granted and the case removed accordingly.

Second. They were stated in a suggestion and motion, filed by the attorney-general in the circuit court of the United States before trial, protesting against the jurisdiction of the court, and moving for a stay of proceedings; which was demurred to by the plaintiff and overruled by the court.

Third. They were proved by the evidence produced by each party at the trial, and were assumed in the instructions given as well as in those requested. One of the instructions requested by the defendants was as follows: "If the jury believe, from the evidence, that the United States is in the possession of the property in controversy, through its officers and agents charged with the control of the same; that the defendants occupy the same only as such officers and agents, in obedience to orders of the war department of the United States, and making no claim of right to the title or possession thereof, except as such officers; that the United States is using the same as a national cemetery for the burial of deceased soldiers, and as a fort and reserve connected therewith, claiming the title thereto under the certificate of sale proved in this cause,—then the verdict must be for the defendants." The court refused this instruction, and gave the following: "If the jury believe from the evidence that at the institution of this suit the premises in controversy were, or that any part thereof was, under the charge and in the occupation or possession of the defendants Strong and Kaufman, or either of them, under the direction of the government of the United States, or of any department or officer thereof, then such occupation or possession is sufficient to enable the plaintiff to maintain his action against them respectively for the premises so occupied or possessed by them respectively."

The court submitted the case to the jury under further instructions, which permitted them to find for the plaintiff upon the ground that the certificate of sale for taxes was invalid as against him, and had vested no legal title in the United States. The jury returned a verdict, upon which judgment was rendered, that the plaintiff recover possession of the premises, partly against Kaufman and partly against Strong. Writs of error were sued out by the United States, and by Kaufman and Strong, and the case has been argued upon both these writs of error.

This is not an action of trespass to recover damages only. Nor is it an action to recover property violently and suddenly wrested from the owner by officers of the government without its directions and without color of title in the government. But it is brought to recover possession of land which the United States have for years held, and still hold, for military and other public purposes, claiming title under a certificate of sale for direct taxes, which is declared by the act of congress of June 7, 1862, ch. 98, sec. 7, to be *prima facie* evidence of the regularity and validity of the sale and of the title of the pur-

chaser, and which has been defined by this court as a “public act which is the equivalent of office found.” *Bennett v. Hunter*, 9 Wall., 326, 336.

§ 688. *Sovereign not liable to be sued.*

The principles upon which we are of opinion that the court below had no authority to try the question of the validity of the title of the United States in this action, and that this court has therefore no authority to pass upon that question, may be briefly stated. The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued.

That maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country. These principles appear to us to be axioms of public law, which would need no reference to authorities in their support, were it not for the exceeding importance and interest of the case, the great ability with which it has been argued, and the difference of opinion that has been manifested as to the extent and application of the precedents.

The exemption of the United States from being impleaded without their consent is, as has often been affirmed by this court, as absolute as that of the crown of England or any other sovereign. In *Cohens v. Virginia*, 6 Wheat., 264, 411 (§§ 734–745, *infra*), Mr. Chief Justice Marshall said: “The universally received opinion is, that no suit can be commenced or prosecuted against the United States.” In *Beers v. Arkansas*, 20 How., 527, 529, Mr. Chief Justice Taney said: “It is an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state; and as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.” In the same spirit, Mr. Justice Davis, delivering the judgment of the court in *Nichols v. United States*, 7 Wall., 122, 126, said: “Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created.” See, also, *United States v. Clarke*, 8 Pet., 436, 444; *Cary v. Cur-*

tis, 3 How., 236, 245, 256; United States v. McLemore, 4 id., 286, 289; Hill v. United States, 9 id., 386, 389; Reeside v. Walker, 11 id., 272, 290; De Groot v. United States, 5 Wall., 419, 431; United States v. Eckford, 6 id., 484, 488; The Siren, 7 id., 152, 154; The Davis, 10 id., 15, 20; United States v. O'Keefe, 11 id., 178; Case v. Terrell, id., 199, 201; Carr v. United States, 98 U. S., 433, 437; United States v. Thompson, id., 486, 489; Railroad Co. v. Tennessee, 101 id., 337; Railroad Co. v. Alabama, id., 832.

The English authorities from the earliest to the latest times show that no action can be maintained to recover the title or possession of land held by the crown by its officers or servants, and leave no doubt that in a case like the one before us the proceedings would be stayed at the suggestion of the attorney-general in behalf of the crown. Our citations will be confined to the time since Magna Charta declared that no man should be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or in any way destroyed, or be passed upon or condemned, but by the lawful judgment of his peers, or by the law of the land,—which is the origin of the provision, embodied in the fifth amendment of the constitution of the United States, that no man shall be deprived of life, liberty or property without due process of law.

The earliest authority to be referred to is Bracton, who wrote in the reign of Henry III., and who, in the famous passage of his first book, affirms that the king ought not to be subject to man, but to God, and to the law, because the law makes the king; and therefore the king should ascribe to the law what the law ascribes to him, namely, dominion and power, for there is no king where reigns will and not law. *Ipsa autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet, dominium et potestatem, non est enim rex, ubi dominatur voluntas et non lex.* Bract., 5b.

Yet no one states more strongly than Bracton the exemption of the king from being sued without his consent in such a case as this; for he says that one who has been disseized by the king, or by his bailiffs in his name, *per dominum regem vel ballivos suos nomine suo*, or, as he elsewhere says, whom the king, or any one in his behalf or in his name, *aliquis pro eo vel nomine suo*, has ejected, cannot, even if the disseizin be manifest, prosecute an assize to recover possession of the land without the king's consent, but must await his pleasure whether the assize shall proceed or not, *expectanda erit voluntas domini regis quod procedat assisa vel non procedat.* Bract., 168b, 171b, 212a.

Lord Coke tells us that before the statute of Westminster I (3 Edw. I.), ch. 24, if an officer of the king, by mere color of his office, and not by the king's command, disseized a man of his freehold, the only remedy was by petition to the king; and that it was to relieve against this evil that the statute enacted that no escheator, sheriff or other bailiff of the king, "by color of his office, without special warrant or commandment, or authority certain pertaining to his office," should disseize any man of his freehold, and that, if he should do so, the disseizee might at his election proceed either by petition to the king, or by assize of novel disseizin at the common law, and the officer should pay double damages to the plaintiff, and a heavy fine to the king, for doing injury in his name to the subject. 2 Inst., 206, 207. But when the entry of the officer was by the king's command, though without authority of law, that statute had no application.

Accordingly in Staunford's Exposition of the King's Prerogative, ch. 22, it is

laid down: "Petition is all the remedy the subject hath when the king seizeth his land, or taketh away his goods from him, having no title by order of his laws so to do, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition; for other remedy hath he not." Staunf. Prerog., fol. 72*b*. "Also whereas the king doth enter upon me, having no title by matter of record or otherwise, and put me out, and detains the possession from me, that I cannot have it again by entry without suit, I have then no remedy but only by petition. But if I be suffered to enter, my entry is lawful and no intrusion. Or if the king grant over the lands to a stranger, then is my petition determined, and I may now enter or have my assize by order of the common law against the said stranger, being the king's patentee." "When his highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it but by petition, for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is my assize revived, for now the patentee entereth by his own wrong and intrusion, and not by any title that the king giveth him, for the king had never title nor possession to give in that case." Fol. 74*b*.

In the reign of Elizabeth, it was resolved by all the judges of England, that "when the king was seized of any estate of inheritance or freehold by any matter of record, be his title by matter of record judicial or ministerial, or by conveyance of record, or by matter in fact and found by office of record, he who has right could not by the common law have any traverse upon which he was to have *amoveas manum*, but was put to his petition of right (in nature of his real action which he could not have against the king, because the king by his writ cannot command himself) to be restored to his freehold and inheritance;" unless, indeed, the right of the party aggrieved appeared by the same record, in which case he might by *monstrans de droit* obtain an *amoveas manum*. Sadler's Case, 4 Rep., 54*b*, 55*a*.

Lord Hale enumerates, among the relative prerogatives of the crown, the prerogative "of his possessions,—that no man can enter upon him, but is driven to his suit by petition." Hale's Analysis of the Law, sec. 9. The law laid down in the early authorities is stated in the same way in the Digest of Chief Baron Comyns, written in the first half of the last century, and in Chitty on the Prerogative of the Crown, published in 1820; and Mr. Chitty treats the action of ejectment as equivalent in this aspect to the ancient form of proceeding by assize. Com. Dig., Prerogative, D. 78; Chit. Prerog., 339–343, and note *c*.

In *The Queen v. Powell*, 1 Q. B., 352; S. C., 4 Per. & Dav., 719, a writ of *mandamus* to admit to a copyhold tenement of a manor belonging to the crown having been directed to the steward alone, it was contended for the prosecutor that a previous decision, requiring the writ to be directed to the lord of the manor as well as to the steward, applied only to cases where the lord of the manor was a subject, and that, inasmuch as there could be no *mandamus* to the sovereign, the writ must go against the steward alone. But Lord Denman, with the concurrence of Justices Littledale, Williams and Coleridge, quashed the writ of *mandamus*; and, after observing that doubtless there could be no *mandamus* to the sovereign, but that the interests of the crown were to be as much guarded as those of the subject, said: "And if the interests of the crown cannot so effectually be protected by a writ against the steward alone, it is a very strong reason to show that such a writ cannot be sustained. Indeed, if it were allowed, it is not certain of being effectual; for if the advisers of the

crown were of opinion that its interests might be affected, and were to advise the sovereign either to order the steward not to admit the prosecutor of the *mandamus*, or to revoke the appointment of the steward, this court could not grant an attachment against the steward, and then the party does not get admitted. And, indeed, if we were to allow a *mandamus* to the steward alone, and the writ were obeyed, the property of the crown would be affected indirectly by the *mandamus* to the steward alone, when it cannot be affected directly by making the sovereign a party to the *mandamus*." "But in the case where there is a complaint on the part of a subject against the crown in any matter whatever, the course is to proceed by petition of right, or else by *monstrans de droit*, or traverse of office, as the case may require. These proceedings have been recognized and acknowledged for many centuries. Such proceedings are now very much out of use, and few instances in modern times have occurred where they have been resorted to; but still they are what must be resorted to if any dispute arises. They are probably expensive and tedious; but these considerations are not sufficient for our dispensing with them; we have no more authority, for the sake of convenience, to lay them aside and introduce writs or other proceedings which are usually adopted between subject and subject, amongst which these writs of *mandamus* are to be reckoned, than to introduce writs and other proceedings, now solely used in cases of prerogative, in causes between subject and subject."

In *The Queen v. Commissioners of the Treasury*, L. R., 7 Q. B., 387, 394, in which the court refused to grant a writ of *mandamus* to the lords commissioners of the treasury to pay over money in their hands as servants of the crown, Lord Chief Justice Cockburn said that it did not follow, because the prosecutor had no remedy except that of applying by petition to the crown, or by petition to parliament, that the court could issue a writ of *mandamus*; and added: "I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the crown, this court cannot claim, even in appearance, to have any power to command the crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the crown, and are amenable to the crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

In *Doe v. Roe*, 8 Mee. & W., 579; S. C., Hurlst. & W., 159, which was an action of ejectment for a house and lands adjoining Hurst Castle, the declaration had been served upon one Watson and upon the board of ordnance. On motion of the attorney-general in behalf of the crown, supported by affidavits that the castle was an hereditary possession of the crown of England, and that the premises sought to be recovered were in possession of the crown, by Watson, who had been placed, by authority of the board of ordnance, as master gunner in charge of the defenses of the castle, which commanded the passage of the Needles, the court of exchequer ordered the declaration to be set aside and all further proceedings stayed. It was contended for the plaintiff that technically the action was trespass against Roe; and that the argument on the other side would go the length of showing that in any case where the defendant in ejectment made an affidavit that the title of the crown came into question the plaintiff would have no resource but in his petition of right. Whereupon the court made these observations: "Lord Abinger, C. B. The real question is, Can an ejectment be tried, the effect of which may be to turn the crown out of possession? Alderson, B. The declaration is served on a

person occupying as the servant of the crown; this case is not like the case put, of lands held under the Woods and Forests; the present difficulty only arises when, supposing the plaintiff to succeed, the crown would be turned out of possession." Hurlst. & W., 160. At the close of the argument Lord Abinger said: "It is quite clear the court could not issue any process to turn the crown out of possession; and the only doubt I had was, whether this property was not, by the operation of the act of parliament, in the possession, not of the crown, but of the board of ordnance. But on looking more fully into the act my doubt is entirely removed." Baron Alderson said: "I am of the same opinion. No ejectment can be maintained against the crown, to turn the crown out of possession, by the authority of the crown itself." And Baron Rolfe (afterwards Lord Chancellor Cranworth) added: "The question may be tested thus: suppose there were no trial, but judgment went against the casual ejector; then there would only be a writ to turn the crown out of possession, which clearly cannot be." 8 Mees. & W., 582, 583.

The same rule, as well as the essential distinction in actions brought against a servant of the crown holding possession in behalf of the crown, between an action of trespass to recover damages, which might be suffered to proceed (although the crown might have it removed for that purpose into the court of exchequer), and an action of ejectment to recover possession of the land itself, which must be absolutely stayed on motion of the attorney-general, is clearly recognized in two cases of trespass to recover damages against officers of the crown, removed upon application of the attorney-general into the office of pleas of the exchequer for trial. *Cawthorne v. Campbell*, 1 Anstr., 205, 215; *Attorney-General v. Hallett*, 15 Mee. & W., 97.

In *Cawthorne v. Campbell*, Chief Baron Eyre, speaking of a case decided in 1710, of an ejectment brought in the court of queen's bench for lands which were part of the queen's estate, said: "There was an application to this court to stay the proceedings, and the parties were heard upon it. The attorney-general attended, and after the hearing it was put off for a day or two. At length the entry is, that an injunction issued *pro domina regina*. So that the action was not removed, but simply an injunction went to stay the proceedings. And I think I can see why that was: if the action had been removed, the question could not have been tried, even in the office of pleas, because you cannot try the queen's title in an ejectment. The queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and therefore it was fruitless to think of removing it, and it remained under an injunction."

So in *Attorney-General v. Hallett*, a case of trespass *quare clausum fregit*, in which the defendant pleaded that the queen was seized in right of her crown of the *locus in quo*, Chief Baron Pollock said: "The action of ejectment is *prima facie* an action merely between subject and subject, and relates to land; yet the prerogative of the crown applies to that; and if the interest of the crown is concerned, an action of ejectment may be removed into this court. It may be said, however, that that does not amount to an authority, because the action does not go on; the reason of that is, that in this court an action of ejectment will not lie against the crown. The party must proceed by a petition of right. In an action of ejectment, we remove it, although we thereby actually extinguish the action; and therefore that is rather an *a fortiori* argument for removing this cause, which is sought to be removed for the express purpose of going on with it." Barons Parke, Alderson and Platt concurred;

and Baron Platt clearly distinguished the case of a defendant holding possession in behalf of the crown from that of a defendant claiming a right in himself only, though under a grant from the crown, saying: "If the queen herself is in possession, no subject can maintain ejectment against her; the only mode of proceeding is by petition of right. If the subject is in possession, claiming a right under the crown, then the ejectment may be maintained; but, at the suggestion of the attorney-general, the proceeding would be brought into this court."

There is a close analogy between these cases and the case at bar. Any action, personal or real, against officers of the sovereign, who justify under a revenue law, may be removed in England into the court of exchequer, and under the acts of congress into the circuit court of the United States. If it is an action of tort to recover damages only, it may there proceed to trial. But if it is an action to recover possession of land, which is in fact held by the sovereign through its officers and agents, and that fact is in due form made known to the court, the proceedings must be stayed.

An action of ejectment brought, as this was, under the code of Virginia of 1873, ch. 131, affects the title to land more than the action of ejectment in England. By that code, the action may not only be brought as before, but it is also made a substitute for the writ of right and all other real actions. Secs. 1, 2, 38. It must be brought by and in the name of a person having a subsisting interest in the premises, and a right to recover the premises or the possession thereof; and against the person actually occupying the premises, or, if they are not occupied, against some person exercising acts of ownership therein, or claiming title thereto or some interest therein. Secs. 4-6. The only plea allowed is the general issue, that the defendant is not guilty of unlawfully withholding the premises claimed. Sec. 13. The declaration must describe the premises with such certainty that from the description possession can be delivered; and it must state, and the verdict must find, whether the plaintiff's estate is in fee, or for life and whose life, or for years and the duration of the term. Secs. 8, 9, 27. Judgment for the plaintiff is that he recover the possession of the premises according to the verdict, if there is one, or, if on default or demurrer, according to the description in the declaration. Sec. 29. Several judgments may be recovered against several defendants occupying distinct parcels of the land. Sec. 17. And the judgment is conclusive as to the title or right of possession, established in the action, upon the party against whom it is rendered, and all persons claiming under him by title accruing after the commencement of the action. Sec. 35.

The principle that no sovereign can be sued without its consent applies equally to foreign sovereigns and to the sovereign of the country in which the suit is brought. The exemption of the sovereign is not less regarded by its own courts than by the courts of other sovereigns. To repeat the words of Chief Justice Taney, already quoted: "It is an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission."

In the leading case of *The Schooner Exchange v. McFaddon*, 7 Cranch, 116, the exemption of a foreign sovereign from being sued in our courts was held to protect one of his public armed vessels from being libeled here in a court of admiralty by citizens of the United States, to whom she had belonged, and from whom she had been forcibly taken in a foreign port by his order. The district attorney of the United States having filed a suggestion, verified by

affidavit, that she was a public armed vessel of the emperor of the French, and actually employed in his service at the time of entering our ports, the circuit court, disregarding the suggestion, entered a decree for the libelants. But upon an appeal taken by the attorney of the United States, this court, without any inquiry into the title, reversed the decree and dismissed the libel; and Mr. Chief Justice Marshall in delivering judgment said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States." (See CONST., §§ 3180-86.)

In *Vavasseur v. Krupp*, 9 Ch. D., 351, the Mikado of Japan, a sovereign prince, bought in Germany shells, made there, but said to be infringements of an English patent. They were brought to England, in order to be put on board a ship of war belonging to the Mikado, and the patentee obtained an injunction against the agents of the Mikado and the persons in whose custody the shells were, restraining them from removing the shells. The Mikado then applied to be and was made a defendant in the suit. An order was made by Sir George Jessel, master of the rolls, and affirmed by the court of appeal, that notwithstanding the injunction, the Mikado should be at liberty to remove the shells. Lord Justice James said: "I am of opinion that this attempt on the part of the plaintiff to interfere with the right of a foreign sovereign to deal with his public property is one of the boldest I have ever heard of as made in any court in this country." And, after stating the contention of the plaintiff that the shells were in the possession of persons in England who were minded to make, and did make, a use of them inconsistent with his patent, he further said: "If they were doing so, then they are liable in an action for damages, and the plaintiff may recover any damages that he may be entitled to. But that does not interfere with the right of the sovereign of Japan, who now asks to be allowed to take his property." Lord Justice Brett said: "The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country; and therefore he is in the position of a foreign sovereign having property here." "If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue." "The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country."

In the case of *The Parlement Belge*, 5 P. D., 197, the court of appeal held that an unarmed packet, belonging to the king of the Belgians, and in the hands of officers commissioned by him, and employed in carrying mails, and also in carrying merchandise and passengers for hire, was not liable to be seized in a suit *in rem* to recover damages for a collision. Lord Justice Brett, in a considered judgment, stated the real question to be "whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign;" and after reviewing many American, as well as English cases, announced the conclusion of the court thus: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such

sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction. This proposition would determine the first question in the present case in favor of the protest, even if an action *in rem* were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded." After stating the mode of procedure in courts of admiralty, he continued: "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court."

It was argued at the bar that the petition of right in England was in effect a suit against the crown. But the petition of right could never be maintained except after an application to the king and his consent granted. The sovereign thus retained the power of determining in advance in every case whether it was consistent with the public interests to allow the suit to be brought and tried in the ordinary courts of justice. The petition might be presented either to the king in person or in parliament; and if sued in parliament, it might be enacted and pass as an act of parliament. Staunf. Prerog., 72*b*; Chit. Prerog., 346. The old form of proceeding by petition of right to the king was so tedious and expensive that it fell into disuse; and there is hardly an instance in which it was resorted to in England between the settlement of the colonies and the declaration of independence, or for half a century afterwards. *Clayton v. Attorney-General*, 1 Coop. temp. Cottenham, 97, 120; *The Queen v. Powell*, 1 Q. B., 353, 363, and 4 Per. & Dav., 719, 723, above quoted; *Canterbury v. Attorney-General*, 1 Phillips, 306, 327; *De Bode's Case*, 8 Q. B., 208, 273. The granting of the royal consent as a matter of course is but of very modern introduction in England. *Eastern Archipelago Co. v. The Queen*, 2 El. & Bl., 856, 914. And the statute of 23 & 24 Vict., ch. 34, simplifying and regulating the proceedings, makes it the duty of the secretary of state for the home department to lay the petition before the queen for her consideration, and to give her his advice upon it; and if upon his advice she refuses to grant her fiat, the suppliant is without remedy. *Irwin v. Grey*, 3 F. & F., 635, 637; *Tobin v. The Queen*, 14 C. B., N. S., 505, 521, and 16 id., 310, 368. In *United States v. O'Keefe*, 11 Wall., 178, 184, in which it was held that British subjects were included in the acts of congress of July 27, 1868, ch. 276, allowing suits for the proceeds of captured and abandoned property to be brought in the court of claims "by aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts," this court, speaking of the English petition of right, said: "It is easy to see that cases might arise, involving political considerations, in which it would be eminently proper for the sovereign to withhold his permission."

The English remedies of petition of right *monstrans de droit*, and traverse of office, were never introduced into this country as part of our common law; but in the American colonies and states claims upon the government were commonly made by petition to the legislature. The inadequacy or the want of those remedies is no reason for maintaining a suit against the sovereign, in

a form which is usual between private citizens, but which has not been expressly granted to them as against the sovereign. *The Queen v. Powell*, above quoted; *Gibbons v. United States*, 8 Wall., 269.

In particular classes of cases, indeed, congress has authorized suits in equity to be brought against the United States; as, for instance, in cases of delinquent receivers of public money against whom a warrant of distress has been issued; in cases of proprietors of land taken and sold to make certain improvements in the city of Washington (in which the bill is spoken of as "in the nature of a petition of right"), and in claims to share in the money received from Mexico under the treaty of Guadalupe Hidalgo. See *United States v. Nourse*, 6 Pet., 470, and 9 id., 8; *Murray v. Hoboken Land Co.*, 18 How., 272, 284; *Van Ness v. Washington*, 4 Pet., 232, 276, 277; *Clark v. Clark*, 17 How., 315, 320. So it has often authorized suits to be brought against the United States to confirm claims, under grants from foreign governments, to lands since ceded to the United States. But in such a suit Chief Justice Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it." *United States v. Clarke*, 8 Pet., 436, 444.

For more than sixty years after the adoption of the constitution, no general provision was made by law for determining claims against the United States; and in every act concerning the court of claims congress has defined the classes of claims which might be made, the conditions on which they might be presented, the forms of proceeding, and the effect to be given to the awards. The act of February 24, 1855, ch. 122, which first established that court, required an act of congress to carry out each award. The act of March 3, 1863, ch. 92, which dispensed with that requirement, authorized the sums due by the judgments of the court of claims, after presentation of a copy thereof to the secretary of the treasury and his estimate of an appropriation therefor, to be paid out of any general appropriation made by law for the satisfaction of private claims. Even under this act the court of claims had so little of the nature of a judicial tribunal, that this court declined to entertain appeals from its decisions, although the statute expressly gave such an appeal. *Gordon v. United States*, 2 Wall., 561; S. C., 5 Am. Law Reg., N. S., 111. It is only since the act of March 17, 1866, ch. 19, has repealed the provision which by necessary implication authorized the secretary of the treasury to revise the decisions of the court of claims, and of this court on appeal, that this court has considered and determined such appeals.

Under the existing statutes the principal classes of demands submitted to the determination of the court of claims are claims founded on laws of congress, on regulations of the executive departments, and on contracts expressed or implied, and claims referred to the court by congress. R. S., sec. 1059. The proceeding by petition to congress and reference by congress to the court of claims presents the nearest analogy that our law affords to the petition of right. No act of congress has conferred upon that court, or upon any other tribunal, general jurisdiction of suits against the United States to recover possession of real property, or to redress a tort. And the act of congress of June 11, 1864, ch. 117 (re-enacted in section 3753 of the Revised Statutes), authorizing the secretary of the treasury to direct a stipulation, to the extent of the value of the interest of the United States, to be entered into for the discharge of any property owned or held by the United States, or in which the United

States have or claim an interest, which has been seized or attached in any judicial proceeding under the laws of a state, expressly provides "that nothing herein contained shall be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."

In *Gibbons v. United States*, 8 Wall., 269, which was an attempt to maintain in the court of claims a suit against the government as upon an implied contract, for unauthorized acts of its officers which were in themselves torts, the court said: "The supposition that the government will not pay its debts, or will not do justice, is not to be indulged;" and, after stating the reasons against the maintenance of the suit, concluded: "These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting in the court of claims of all wrongs done to individuals by the officers of the general government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, congress has wisely reserved the matter for its own determination." In *Langford v. United States*, 101 U. S., 341, the remarks just quoted were repeated, and were applied to the case of a suit for the use and occupation of land which the United States, under a claim of title, had, through its Indian agents, taken possession of and since held by force and against the will of the rightful owner.

If it is proper that the United States should allow themselves to be sued in such a case as this, public policy requires that it should rest with congress to define the mode of proceeding, the conditions on which it may be maintained, and the manner in which the decision shall be enforced,—none of which can be done if the citizen has an absolute right to maintain the action.

If the plaintiff is entitled to judgment, it can only be upon the ground that the United States are not a party to the record, and have no such relation to the action that their possession of the land demanded will prevent judgment against the defendants of record. If those defendants alone are to be held to be parties or interested, the plaintiff is entitled, as of right, to immediate execution as well as to judgment; and the court has no discretion to stay an execution between private parties on considerations of the interests of the public.

To maintain this action, independently of any legislation by congress, is to declare that the exemption of the United States from being impleaded without their consent does not embrace lands held by a disputed title; to defeat the exemption from judicial process in the very cases in which it is of the utmost importance to the public that it should be upheld; and to compel the United States to submit to the determination of courts and juries the validity of their title to any land held and used for military, naval, commercial, revenue, or public purposes.

The decision of this court and the reasoning of the several judges in the case of *Chisholm v. Georgia*, 2 Dall., 419, in which a majority of the court held that under the constitution, as originally adopted, a suit could be maintained in this court against a state by a citizen of another state, do not appear to us to furnish much aid in the determination of this case, for several reasons: 1st. Each of the judges who mentioned the subject declined to affirm that the

United States could be sued. 2 Dall., 430, 469, 478. 2d. The decision was based on a construction of the words of the constitution conferring jurisdiction of suits between "a state and citizens of another state." 3d. That construction was set aside by the eleventh amendment of the constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." 2 Dall., 480, note; *Hollingsworth v. Virginia*, 3 Dall., 378.

In those cases in which judgments have since been rendered by this court against individuals concerning money or property in which a state had an interest, either the money was in the personal possession of the defendants and not in the possession of the state, or the suit was to restrain the defendants by injunction from doing acts in violation of the constitution of the United States. Within one or both of these classes fall the cases of *United States v. Peters*, 5 Cranch, 115; *Osborn v. Bank of United States*, 9 Wheat., 738; *Davis v. Gray*, 16 Wall., 203; and *Board of Liquidation v. McComb*, 92 U. S., 531.

In *United States v. Peters*, 5 Cranch, 115, in which a writ of *mandamus* was ordered to a district court of the United States sitting in admiralty to issue an attachment against the executrixes of David Rittenhouse to enforce obedience to a decree of that court for the payment of money (although Rittenhouse had been treasurer of the state of Pennsylvania, and the legislature of that state had directed its attorney-general to sue the executrixes for the recovery of the money, and the governor to protect them against any process of the federal courts), the judgment of this court, as stated by Mr. Chief Justice Marshall, went upon the ground that it was apparent that Rittenhouse held the money in his own right, and that "the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title." The chief justice stated the conclusion of the court as follows: "Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and, consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

The chief justice thus carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the state, or "the actual property of the state, however wrongfully acquired;" and his remark upon the effect of a mere suggestion of title in the state in a suit to recover "property in possession of an individual," as well as his similar remark in *Osborn v. Bank of United States*, 9 Wheat., 738, 870, as to the effect of a suggestion of title in a foreign sovereign, under like circumstances, can have no application where it is in due form pleaded or suggested, and satisfactorily proved or admitted, that the property is in the possession of the state or the sovereign, under claim

and color of title, though that possession is necessarily held in its behalf by its officers or servants, as appears by his own judgment in the case of *The Exchange*, as well as by the cases in the court of exchequer before cited.

In *Osborn v. Bank of United States*, 9 Wheat., 738, the bill was originally filed by the Bank of the United States against the auditor of the state of Ohio and a collector employed by him to prevent them from levying a tax imposed by the legislature of that state, in violation of the constitution of the United States, upon the property of the bank; and they, after the service of the subpoena, forcibly took from the plaintiff's office the amount of the tax in money, and paid it over to the treasurer of the state, who received it with notice of these facts, and kept it apart from other money belonging to the state, so that, in the view taken by the court, it had never come into the possession of the state, but could have been recovered from the treasurer in an action of detinue. 9 Wheat., 833-836, 854, 858. By an amendment of the bill, the treasurer was made a defendant. Such were the facts upon which the court, by one of Mr. Chief Justice Marshall's most elaborate judgments, in which the case was admitted to be one of great difficulty, ordered the defendants to restore the money, and held that the fact that the state was not, and could not be, without its consent, made a defendant, afforded no objection to granting such relief.

The *dictum* of the learned justice who delivered the opinion in *Davis v. Gray*, 16 Wall., 203, 220, that in *Osborn v. Bank of United States*, it was decided that, in cases in which a state is concerned, "that it cannot be made a party is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record," overstates the decision in *Osborn's* case; goes beyond what was required for the decision of *Davis v. Gray*, in which the object of the suit and the whole effect of the decree were to prevent the governor and the commissioner of the general land office of the state of Texas from signing patents for lands of which the plaintiff had the title under a previous grant from the state; and, as the state cannot hold money or property otherwise than by its officers and agents, would, if understood as laying down a universal rule, practically nullify the eleventh amendment of the constitution.

In *Board of Liquidation v. McComb*, 92 U. S., 531, in which an injunction was granted to restrain the board of liquidation, consisting of the governor and other officers, of the state of Louisiana from issuing or using, in violation of a previous contract of the state with the plaintiff, bonds of the state in their hands, the court said that the objections to proceeding by injunction were, "first, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state without its consent cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter." And the ground upon which the bill in that case, as well as in the previous cases of *Osborn v. Bank of United States* and *Davis v. Gray*, was sustained, was defined to be, that when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an unconstitutional, and therefore void, law for the violation of his duty.

The case of *The Governor of Georgia v. Madrazo*, 1 Pet., 110, does not ap-

pear to us to have any important bearing, except as tending to illustrate the distinction between the possession of the state by its agents, and the possession of the agents in their own right. The decision was that where negro slaves were illegally taken from the owner on the high seas, and afterwards sold to a stranger, who, without the privity of the owner, imported them into the United States in violation of the act of congress of March 2, 1807, ch. 22, and they were here seized by an officer of the customs of the United States, and delivered to an agent appointed by the governor of the state of Georgia in conformity with the act of congress, and some of them sold by order of the governor of the state, and the money obtained at the sale was, in the words of Mr. Chief Justice Marshall, "actually in the treasury of the state, mixed up with its general funds," and the rest of the slaves remained in the hands of the agent of the state, "in possession of the government," a libel in admiralty by the owner to recover possession of the money and slaves, though not brought against the state by name, but against the governor in his official capacity, was a suit against the state, and therefore, by reason of the eleventh amendment of the constitution, could not be maintained. See, also, *Ex parte Madrazo*, 7 Pet., 627.

In the case on which the plaintiff principally relies, of *Meigs v. M'Clung*, 9 Cranch, 11, in which a circuit court of the United States, and this court on writ of error, gave judgment for the plaintiff in an action of ejectment for land held by the defendants as officers and under the authority of the United States, the full statement of their position in the bill of exceptions, on page 13 of the report, clearly shows that the fact that they so held the land was not set up in defense, except as supplemental to the position that the legal title to the land was in the United States; and it does not appear to have been mentioned in argument. No objection to the exercise of jurisdiction was made by the defendants or by the United States, or noticed by the court. That the court understood the United States to desire a decision upon the merits is further apparent from Mr. Chief Justice Marshall's summary towards the close of the opinion, "The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence and without compensation." Had the decision covered the question of jurisdiction, the chief justice would hardly have omitted to refer to it in *Osborn v. Bank of United States*, above stated.

In *Wilcox v. Jackson*, 13 Pet., 498; in *Brown v. Huger*, 21 How., 305; and in *Grisar v. McDowell*, 6 Wall., 363, which were also actions of ejectment against officers of the United States, the judgments were in favor of the defendants on the merits; no suggestion that the United States were so interested that the action could not be maintained was made by counsel or passed upon by this court, and that the court has not hitherto understood any such question to be settled by any or all of those cases is clearly shown by its more recent judgments.

In the case of *The Siren*, 7 Wall., 152, the court said: "It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemp-

tion from direct suit is therefore without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation — the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of congress. Such is the language of this court in *United States v. Clarke*, 8 Pet., 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property."

In the case of *The Davis*, 10 Wall., 15, the court stating the doctrine somewhat less broadly, yet affirmed the proposition as clearly established by authority, that "no suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court;" and in discussing the question, what constitutes a possession which protects the property from the process of the court, said: "We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of the property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process."

In *The Siren* a claim for damages against a prize ship for a collision on her way from the place of capture to the port of adjudication was allowed out of the proceeds of her sale upon condemnation, because the government was the actor in the suit to have her condemned. In *The Davis* a claim was allowed for salvage of goods belonging to the United States in the hands of the master of a private vessel as a common carrier, because his possession was not the possession of the United States, and the United States could only obtain the goods by coming into court as claimant and actor. Each of those cases, as was pointed out in *Case v. Terrell*, 11 Wall., 199, 201, was decided upon the ground that "the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others."

In *Carr v. United States*, 98 U. S., 433, in which it was decided that judgments in ejectment against officers of the government, in possession in its behalf of lands held for a marine hospital, did not bind nor estop the United States, it was said, in the opinion of the court: "We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no state can pass a law which would have any validity for making the government suable in its courts. It is conceded in *The Siren*, 7 Wall., 152, and in *The Davis*, 10 id., 15, that without an act of congress no direct proceeding can be instituted against the government or its property. And in the latter case it is justly observed that 'the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property,

coupled with actual possession.' If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a postoffice or a custom-house, a prison or a fortification. In some cases (perhaps it was so in the present case) it might not be apparent until after suit brought that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings or the proofs, the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court and litigate with private parties in defense of its property."

The view on which this court appears to have constantly acted, which reconciles all its decisions, and is in accord with the English authorities, is this: The objection to the exercise of jurisdiction over the sovereign or his property, in an action in which he is not a party to the record, is in the nature of a personal objection, which, if not suggested by the sovereign, may be presumed not to be intended to be insisted upon. If ejectment is brought by one citizen against another, the court *prima facie* has jurisdiction of the subject-matter and of the parties, and, if no objection is interposed in behalf of the sovereign, proceeds to judgment between the parties before it. If the property is in the possession of the defendants and not of the sovereign, an informal suggestion that it belongs to the sovereign will not defeat the action. But if the sovereign, in proper form and by sufficient proof, makes known to the court that he insists upon his exemption from suit, and that the property sued for is held by the nominal defendants exclusively for him and on his behalf as public property, the right of the plaintiff to prosecute the suit and the authority of the court to exercise jurisdiction over it cease, and all further proceedings must be stayed.

In the case at bar, the United States interposed in the most solemn and appropriate manner. The attorney-general, before the trial, following the course approved by this court in the case of *The Exchange*, and by the court of exchequer in the case of *Doe v. Roe*, and other cases, already referred to, filed a suggestion and motion in writing, in which, appearing only for this purpose, he states that the land has been for more than ten years, and still is, held, occupied and possessed by the United States, through their officers and agents charged in behalf of the government of the United States, with the control of the property, and who are in the actual possession thereof, as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers, as a military station and as a national cemetery established for the burial of deceased soldiers and sailors, known as the Arlington Cemetery, and for war, military, charitable and educational purposes, as set forth in the certificate of sale of the land for non-payment of direct taxes lawfully assessed thereon, a copy of which is annexed to the suggestion. Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration may be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper. The plaintiff, by demurring to this suggestion, admitted the truth of the facts stated by the attorney-general.

After these facts had been thus formally brought to the notice of the court by the chief law officer of the United States, and had been admitted by the plaintiff, we are of opinion that the court had no authority to proceed to trial and judgment; because the suit, which had been commenced against the individ-

ual defendants, was thenceforth prosecuted against the United States; because in ejectment, as in other actions at law, a court has no authority to render a judgment on which it has no power to issue execution; because, as was directly adjudged in *Carr v. United States*, 98 U. S., 433, above cited, no judgment against the defendants can bind or estop the United States; because the possession of the defendants is in fact and in law the possession of the United States, and the defendants may at any moment be displaced and removed by the executive, and other custodians appointed and installed in their stead; because to issue an execution against them would be to issue an execution against the United States, and to turn the United States out of possession of land held by the United States, under claim of title and color of right for public purposes; and because to maintain a suit which has that object and that result is to violate the fundamental principle that the sovereign cannot be sued without its consent, and to encroach upon the powers intrusted by the constitution to the legislative and executive departments of the government.

The court having no authority to proceed with the suit, the judgment afterwards rendered for the plaintiff was erroneous. The United States, having the right to interpose, and having interposed in due form, had an equal right to sue out a writ of error to make their interposition effectual. This is plainly shown by the case of *The Schooner Exchange*, 7 Cranch, 120, 147, before cited. It follows that upon the writ of error sued out by the United States the judgment below should be reversed, and the case remanded with directions to set aside the verdict and to dismiss the action.

As to *Kaufman and Strong*, the court erred in compelling them to proceed to trial after the interposition of the United States; and in declining to instruct the jury, as they requested, that if the United States, through their officers and agents charged with the control of the same, were in the possession of the property in controversy, using it as a national cemetery for the burial of deceased soldiers, and as a fort and military reservation, claiming title under the certificate of sale proved in the case, and the defendants occupied the same only as such officers and agents, in obedience to orders of the war department of the United States, and making no claim of right to the title or possession except as such officers, the verdict must be for the defendants. Judgment of reversal should therefore also be entered upon the writ of error sued out by them.

Being of opinion, for the reasons above set forth, that the question of the validity of the title, under which the United States, through their officers and agents, hold the land, cannot be tried and determined in this action, we of course express no opinion upon that branch of the case.

DEN EX DEM. NEW JERSEY *v.* BABCOCK.

(Circuit Court for New Jersey: 4 Washington, 344-347. 1823.)

STATEMENT OF FACTS.—Motion to remand a cause removed from a state court because a state was a party. There were two counts in the declaration. It was objected that the count upon the demise of the state was merely to oust the jurisdiction of the federal court, and that the lessor named in the second count was the real plaintiff.

Opinion by WASHINGTON, J.

The motion to remand this cause to the supreme court of the state in which it was commenced presents but one question for our consideration, and that is

whether it was properly removed into this court under the provisions of the twelfth section of the judiciary act, which declares that "if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the sum or value of \$500, exclusive of costs," etc., it shall be the duty of the state court to proceed no further in the cause. The section then provides for the trial of the cause in the circuit court to which it is removed.

§ 689. *The circuit court has no jurisdiction in causes in which a state is a party. Such a cause, when removed from a state court, even though docketed, must be remanded.*

If the cause be not one which is removable from the state to the United States court under the above section, it ought not to be placed upon the docket of the latter court; and if it should be improvidently placed on that docket, either by the order of that court or without it, it can never be too late, before the trial at least, to remand it to the court from which it was improperly removed. The suit not having originated in the circuit court, it is impossible that that court can take cognizance of it, unless it was legally removed into it from the court in which it originated. Upon what justifiable ground can the cause be retained here, when the court perceives, from the face of the record, that every step which can be taken in it is *coram non judice*, and that it must be finally dismissed for want of jurisdiction? By the declaration filed in this case, it appears that the state of New Jersey is substantially a party plaintiff in the cause; and this is a fact which cannot be controverted at the trial. But this court cannot hold jurisdiction of a cause wherein a state is a party, because it is not bestowed upon it by any act of congress. A suit in which a state is plaintiff cannot, for another reason, be removed from a state into a United States court under the above section of the act of congress, since it cannot, without a manifest absurdity, be affirmed "that the plaintiff is a citizen of the state in which the suit is brought."

§ 690. *The court must depend on the record for its knowledge whether or not a state is a party.*

The only difficulty which this court felt at the last session, upon the motion to docket the cause, arose from considering the insertion of the count upon the demise of the state, as having been made for the purpose of preventing the cause from being removed from the state court, and intended to commit a fraud upon the jurisdiction of this court. But we are satisfied, upon further reflection, that although it is in the power of a plaintiff to practice a trick of this sort for the purpose which has been mentioned, still it must rest with congress to provide a remedy for such a case; it is not in the power of this court to do it. All that we can know of the cause is exhibited by the record of it as removed from the state court; and by this it appears that the state is a party to the cause, and claims title to the land in controversy. The suit was instituted in a court which had complete jurisdiction of it, and whether it was properly brought or not, either on account of a defect of power in the governor to bring the suit in her name, or of the alleged incompatibility of the two demises in the declaration, are questions which may be fit to be investigated in the state court, but are improperly brought to the view of this court, where a well-grounded objection is made *in limine* to its jurisdiction of the cause.

§ 691. *The court cannot remand part of the cause and retain the rest.*

What then can this court do? We cannot retain the whole cause and give judgment in it for or against the state, because as to the state we have no juris-

diction. We should, consequently, be compelled to dismiss the cause as to her from this tribunal, and thus she would be baffled in her efforts to assert her right to the land in controversy, in her own way, either in the state court or in this. The power of removal, if it exists, would prevent a trial in the former, and the want of jurisdiction would turn her out of the latter. This doctrine can never be maintained. It is quite impossible for this court to sever the cause, and remand that part of it which involves the right of the state, and retain the residue of it. The truth is, that unless the circuit court has jurisdiction of the whole of the cause, the case is not embraced by the above section of the act of congress which speaks of *a suit* commenced by *a citizen* of the state in which it is brought, and provides that the state court shall proceed no further in *the cause*. The whole cause or suit then must be removed, or no part of it can.

The inconvenience, if it be one, to which the defendant is subjected of trying his cause in the state court instead of a court of the United States, is not greater than is experienced in many other cases where there are more parties than one, plaintiffs or defendants, as to some of whom the court has jurisdiction, but not so as to the others. In such cases, if all the parties must join, the jurisdiction of the federal courts is excluded. 1 Wheat., 91; 3 Cranch, 267. The cause remanded.

BANK OF UNITED STATES *v.* PLANTERS' BANK.

(9 Wheaton, 904-914. 1824.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Georgia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—In this case the petition of the plaintiff, which, according to the practice of the state of Georgia, is substituted for a declaration, is founded on promissory notes, payable to a person named in the note, "or bearer," and states that the notes were "duly transferred, assigned and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," etc.

The Planters' Bank pleads to the jurisdiction of the court, and alleges that it is a corporation, of which the state of Georgia and certain individuals, who are citizens of the same state with some of the plaintiffs, are members. The plea also alleges that the persons to whom the notes mentioned in the petition were made payable were citizens of the state of Georgia, and therefore incapable of suing the said bank in a circuit court of the United States; and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that court. To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the judges were divided on two questions: 1. Whether the averments in the declaration be sufficient in law to give this court jurisdiction of the cause? 2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment?

The first question was fully considered by the court in the case of *Osborn v. The Bank of the United States*, 9 Wheat., 738, and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the court jurisdiction of the cause.

2. The second point is understood to involve two questions: 1. Does the circumstance that the state is a corporator bring this cause within the clause

in the constitution which gives jurisdiction to the supreme court where a state is a party, or bring it within the eleventh amendment? 2. Does the fact that the note is made payable to a citizen of the state of Georgia, or bearer, oust the jurisdiction of the court?

§ 692. *A bank is not exempted from suit by the fact that a state is one of the corporators.*

1. Is the state of Georgia a party defendant in this case? If it is, then the suit, had the eleventh amendment never been adopted, must have been brought in the supreme court of the United States? Could this court have entertained jurisdiction in the case? We think it could not. To have given the supreme court original jurisdiction, the state must be plaintiff or defendant as a state, and must, as a state, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the state of Georgia than against any other individual corporator. The state is not a party, that is, an entire party, in the cause.

If this suit could not have been brought originally in the supreme court, it would be difficult to show that it is within the eleventh amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the supreme court could have taken original jurisdiction, it is not within the amendment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the supreme court. This suit is not to be sustained because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court who is not withdrawn from its jurisdiction by the constitution or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it.

It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.

The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator,

lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter. We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts by the circumstance that the state is a corporator.

§ 693. *The right of the Bank of the United States to sue in the federal courts is conferred by its charter, and is not affected by the limitation in section 11 of the judiciary act.*

2. We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the state of Georgia. Without examining whether, in this case, the original promise is not to the bearer, the court will proceed to the more general question, whether the bank, as indorsee, may maintain a suit against the maker of a note payable to a citizen of the state. The words of the judiciary act, section 11, are: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

This is a limitation on the jurisdiction conferred by the judiciary act. It was apprehended that bonds and notes given in the usual course of business, by citizens of the same state, to each other, might be assigned to the citizens of another state, and thus render the maker liable to a suit in the federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits brought by the citizen of one state against the citizen of another, restrains that jurisdiction, where the suit is brought by an assignee, to cases where the suit might have been sustained had no assignment been made. But the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States.

If the bank could not sue a person who was a citizen of the same state with any one of its members, in the circuit court, this disability would defeat the power. There is, probably, not a commercial state in the Union, some of whose citizens are not members of the Bank of the United States. There is, consequently, scarcely a debt due to the bank, for which a suit could be maintained in a federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any circuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one.

We think, then, that the charter gives to the bank a right to sue in the circuit courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favor of the plaintiff.

MR. JUSTICE JOHNSON dissented.

CHAFFRAIX v. BOARD OF LIQUIDATION.

(Circuit Court for Louisiana: 11 Federal Reporter, 639-655. 1882.)

Opinion by PARDEE, J.

STATEMENT OF FACTS.—The bill in this cause is brought by the complainant, a citizen of France, against the defendants, as members of the state board of

liquidation, to prevent the diversion of certain funds, collected by taxation under the consolidated bond acts of 1874, to pay the coupons of the consolidated bonds falling due January 1, 1880, which funds are now in the hands on deposit of one of the defendants. It is alleged that these funds are "trust funds," and that the defendants threaten to divert them under authority of the third article of the state-debt ordinance, adopted with the constitution of 1879, reading: "That the coupon of said consolidated bonds falling due the 1st of January, 1880, be and the same is hereby remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the state government;" and under act No. 3 of the legislature of 1881, approved January 4, 1882, entitled "An act to provide for the funding of the interest fund now in the hands of the fiscal agent of the state and to accrue, into bonds of the United States government, and to provide for the payment of the reduced interest due or to become due on the bonds of the state," and which act transfers the fund collected to pay the January, 1880, coupons of the consolidated bonds to a reduced interest fund. It will be noticed that this last act is in direct conflict with the third article of the debt ordinance, as the latter transfers the fund to pay the general expenses of the state government, while the former transfers the fund "to pay the reduced interest that is or may become due on state bonds converted or stamped under the ordinance of the constitution of 1879, in reference to the state debt." The said article of the debt ordinance of the constitution, and the said act No. 3 of 1881, are alleged by the bill to be in violation of section 10, article 1, of the constitution of the United States, as impairing the obligations of the contract under which complainant's bonds were issued. The bill prays for a receiver and an injunction.

§ 694. *The circuit court has jurisdiction to prevent ministerial officers of the state from diverting a fund set apart by statute to pay bonded debts.*

The question necessary to pass upon at this time is merely whether, under the showing made in the bill, an injunction may issue pending the suit; the only objection urged being that the state of Louisiana is the real party defendant, and that, therefore, the court is without jurisdiction by reason of the eleventh amendment to the constitution. This question has been settled in this court in the case of *McComb v. Board of Liquidation*, 2 Woods, 48, and affirmed by the supreme court, 92 U. S., 531, which was a case arising under the very same act, amendment, and contract as the case under consideration. In that case the defendants sought shelter under the sovereignty of the state as a cover to execute an unconstitutional law of the state; but the courts held that an injunction would lie against them as individuals and as officials of the state, notwithstanding the law or the interest of the state, to prevent them from violating the contract of 1874, and that to such a suit the state was not a necessary party.

If the court has jurisdiction to prevent the defendants from violating the contract between the state and the bondholders by issuing bonds at par, to the detriment of the stockholders' security, what doubt can there be of the jurisdiction of the court to prevent the defendants from diverting the entire security. No case yet decided in this court denies the jurisdiction to restrain the defendants as individuals from impairing the obligations and securities of the funding acts of 1874. For my own part I have no doubt that the courts of the United States, if proper cases are made, can prevent any agent of the state, as well as any individual, from diverting a dollar from the fund actually collected under the act and amendment of 1874.

§ 695. *The board of liquidation of Louisiana were trustees of the bondholders, and as such were within the equity jurisdiction of the court to enforce the trust.*

The difficulty is and has been, what use is there in merely tying up the funds? If the bondholders cannot have their dues, why hinder the money from going to pay the expenses of the state? As there is some force in these objections, it is necessary to examine further into the purposes of the present bill. Every case that has been brought heretofore has been on the theory that the court should compel the levying and collection of the five and a half mill tax provided by act of 1874, or should reach into the treasury of the state and take the moneys of the state and apply them to the payment of the bonded debt of the state, or that the court should by mandatory process carry into full effect the act and amendment of 1874, levy and collect the tax, and pay the bondholders. The present bill is brought only in relation to such funds as have been levied and collected from the tax payers of the state under the act and amendment of 1874, and have passed from the tax collectors to the state treasurer, and from the state treasurer to the fiscal agent of the state, where they are now held as a separate and distinct fund, to the credit of the interest fund created by the act of 1874, and is based upon the following propositions of law and fact:

The act of the legislature of Louisiana of 1874, approved January 24th of that year, and the constitutional amendment of 1874, ratified by the people in that year, created a trust fund of all moneys collected and paid over to the state fiscal agent under the said law and amendment for the purposes therein specified, and of that fund, so coming into his hands, the state treasurer, state auditor and the board of liquidation became the trustees; the holders of the consolidated bonds, issued under the said law and amendment, became primarily the beneficiaries, the state of Louisiana occupying the position of and having only the interest of a debtor who has created a trust for the payment of his creditors, and is not a necessary party to this suit.

These propositions seem to me to have great force and plausibility, and they can be supported by very respectable authority. That a state, by its legislation, or by its public officers duly authorized, can create a trust, convey property and appoint trustees, see Perry, Trusts, § 30; *Com'rs v. Walker*, 6 How. (Miss.), 143; *State v. Rusk*, 21 Wis., 216. That the trustees may be the officers of the state, see Perry, Trusts, § 47, and cases there cited. That the said act and amendment created a trust, see Perry, Trusts, § 82; *Maenhaut v. New Orleans*, 2 Woods, 108, and the numerous cases there cited by Judge Woods.

That the state treasurer, state auditor and the board of liquidation are constituted the trustees, see latter part of section 7 of the act of 1874, and the latter part of the first amendment of 1874. When the proceeds of the five and a half mill tax, under the act of 1874, reached this board of liquidation, no further act of the state — no order, no appropriation — was necessary. No discretion was given. The money was to be paid to the bondholders, and the law made it a felony to divert it. See section 7 of the act of 1874, and article 1 of amendment.

The interest of the state, if she have any, is that of a *cestui que trust* subordinate to the bondholders. If a *cestui que trust* is entitled to a distinct and aliquot share of an ascertained fund, he may maintain a bill against the trustees for that share without joining the *cestuis que trust* of the remaining fund. See Perry, Trusts, § 882, and authorities there cited. The bill shows that the fund sought to be reached is not sufficient to satisfy the legitimate demands of

the bondholders, and the conclusion ought to follow that the state has no resulting interest.

If all the members of the board of liquidation were private citizens, as two of them are, not holding any state office, what doubt could there be among lawyers as to the fiduciary relation of the board to the bondholders? And, under the authority of a number of adjudicated cases, the fact that the trustees are officials of the state creating the trust would seem to make no difference.

In *Com'rs v. Walker*, 6 How. (Miss.), 143, the commissioners of the sinking-fund were held to be trustees of that fund, and liable to sue and be sued, although officers of the state. In *State v. Rusk*, 21 Wis., 216, the bank controller of the state was declared the trustee of the securities in his hands, although he was an official of the state, sworn and bonded. It is elementary that particular formality is not required in the creation of a trust. Any agreement or contract in writing made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property, or a certain fund, shall be held or dealt with in a particular manner for the benefit of another, in a court of equity, raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him, voluntarily or with notice.

And it is said that "equity loves a trust," and that "equity will never allow a trust to fail for want of a trustee." Now, if the foregoing propositions in regard to the character of the funds levied and collected under the funding acts of 1874, and now in the hands of the defendants, are correct, there would seem to be no doubt as to the power of the court to grant the relief sought in the bill — first, by preserving the funds until an account can be taken, and then by a receiver, as prayed in the bill, distributing the funds to their proper owners.

§ 696. *The state of Louisiana had violated but had not abrogated the original contract with the bondholders.*

But there is a broader view that may be taken of the quantum or relief that the courts may grant under the showing made by the bill. There can be no doubt that the act and amendment of 1874 constitutes a contract between the state of Louisiana and the holders of the consolidated bonds issued under said contract. The terms, provisions, stipulations and agreements contained in said act and amendment leave no doubt on this point. But that the man who reads may know for certain, it is expressly declared in the act, and reiterated in the amendment, that it is "a valid contract between the state and each and every holder of said bonds, which the state shall by no means, and in no wise, impair." Now, if the main contracting party, the state of Louisiana, were an ordinary individual or corporation, what question could be made against enforcing this contract against all parties in a court of equity? But the state of Louisiana cannot be sued in her own courts without her consent, nor in the courts of the United States, by any citizen, native or foreign; and this difficulty in the way of putting the parties to the contract on equal terms before the law was obviated by the provision in the amendment that "no court shall enjoin the payment of the principal or interest thereof (referring to the bonds), or the levy and collection of the tax therefor. To secure such levy, collection and payment the judicial power shall be exercised when necessary."

Now, if a constitutional amendment, ratified by a vote of the people, can have any force, it seems as clear as words can make it, that, as to the consolidated bonds, and the levy and collection of taxes to pay the interest thereof,

and the payment of the interest, the state of Louisiana abdicated and renounced her exemption from suit, and contracted to stand before the courts as an ordinary litigant. And, moreover, provided that the various state officers might be coerced by the courts to perform the various duties devolving upon them under the said act and amendment. Has the state ever repealed or abrogated the contract? If so, when? The state has defaulted on the payment of interest. She has repudiated five-sevenths of the stipulated interest. She has remitted the coupons falling due January 1, 1880, and has undertaken to appropriate the interest taxes collected to pay the said coupons to other purposes. She has stopped her officers from levying and collecting the tax stipulated in the contract. She has violated her contract, but she has not in terms abrogated it, and she has not yet denied the jurisdiction of the courts "to secure such levy, collection and payment."

Concede that the state never consented that she might be sued like any other litigant, or that, having so consented, she has revoked her consent, the right to compel her officers to perform their various duties under the said act and amendment has never been revoked, and the courts of the state have entertained, and still entertain, suits to that end. It is true that the present supreme court of Louisiana, in the case of *Hart v. Burke*, has decided that the courts of the state are, under the present constitution, powerless to compel the levy of the tax to pay the interest under the funding act, or to prevent the diversion of the accumulated interest fund collected under said act, and, so far, the state may be said to have revoked; but I deny that there is a scrap of constitution or law declaring a revocation of the declaration in the contract of 1874, that "to secure such levy, collection and payment the judicial power shall be exercised when necessary." There is no doubt that if the courts of the state have such power, the United States courts in proper cases have the same power.

§ 697. *Though the court had no jurisdiction against the state directly, yet it could enjoin the board of liquidation from diverting the funds set apart under the funding act of 1874. Authorities cited.*

But be this question of jurisdiction of the state courts as it may, the contract of the state with the holders of the consolidated bonds cannot be impaired by any law or constitutional provision of the state without violating the constitution of the United States, and any such impairment the courts of the United States are bound to disregard. Now it may well be that, notwithstanding the consent and renunciation of the state, the federal courts cannot entertain jurisdiction where the state is a necessary party in order to grant the relief sought; and yet, wherever the state is not absolutely required as a party, the courts can act upon the agents of the state to enforce the contract that the state has consented may be so enforced.

To compel the levy and collection of a tax, which is an exercise of sovereignty, may require the presence of the sovereign; but when the tax has been levied and collected, and paid over to the treasurer, and by him deposited and set apart, and nothing remains but a ministerial duty to be performed, what need is there of making the state a party, and why cannot relief be granted by injunction, mandatory or otherwise? See *Davis v. Gray*, 16 Wall., 203, and cases there cited, pp. 220 and 221; *McComb v. Board of Liquidation*, 2 Woods, 48, and 92 U. S., 531, and cases cited; *Hancock v. Walsh*, 3 Woods, 351; *Vose v. Trustees*, 2 Woods, 648. In the leading case of *Osborn v. Bank*, 9 Wheat., 738, the state of Ohio had a direct pecuniary interest in the funds reached. The seizure of the funds was her act, and they were carried on her books as

part of the general funds in her treasury. Actually the funds were kept separate, but no more so than this interest fund now in the hands of the defendant, the fiscal agent.

The case of *Davis v. Gray* was not, as counsel have argued, decided wholly under the law of Texas. The court says: "Upon the grounds of the jurisdiction of both the United States and of Texas, we hold this bill well brought as regards the defendants." And there is no adjudicated case in the federal courts called to my attention that is directly against this view of the case. The case of *McCauley v. Kellogg*, 2 Woods, 13, was a case brought on bonds of the state, where there was no conceded contract that the judicial power might be invoked to secure the levy and collection of the necessary tax and payment of the interest, and the relief sought was to compel the officers of the state to levy and collect taxes.

The case of *Elliott v. Nicholls*, not reported, is a very strong case and well reasoned, but that case was on a bill shaped directly against moneys in the state treasury, and originally against the state itself as a party. The case is now on appeal to the supreme court. Two cases seem to have carried great weight in the Case of *Elliott* — the celebrated Banker's Case, 14 How. St. Tr., and *United States v. Guthrie*, 17 How., 284.

The Banker's Case was overruled by the house of lords, following the opinion of Chief Justice Holt, and stands as authority only upon the argument of Lord Somers, who practically justified a villainous fraud by sustaining the king's prerogative. The case of *United States v. Guthrie* was decided by a divided court, and the judgment was based by four of the judges on the ground that the treasurer of the United States could not be compelled by *mandamus* to pay money from the treasury, although legally appropriated; by four others on the ground that a writ of *mandamus* on the secretary of the treasury was not a legal remedy to try relator's right to office; Judge McLean dissenting entirely. So that case practically decides nothing, and Judge McLean's reasoning is fully as strong as Judge Daniel's, and is more in accordance with the principles of republican government. And Judge McLean cites the case of *Kendall v. United States*, 12 Pet., 608, where a *mandamus* was allowed against the postmaster-general, as settling the question. And the case of *United States v. Schurz*, 102 U. S., 378, seems to settle the question again, that an executive officer of the United States, even a cabinet minister, may be compelled by *mandamus* to perform a ministerial and positive duty.

It seems to me to go without argument that the ministerial and positive duty of the defendants to pay the relator's coupons is just as plain as it can be made. The case of *Hart v. Burke*, 33 La. Ann., 499, "simply decides that under the laws, jurisprudence and system of practice prevailing in this state and regulating the powers of Louisiana courts, the remedies invoked by the plaintiff in these cases are such as no courts of this state possess or ever possessed the power to grant in a proceeding of the character of that presented;" in other words, that the state courts have no jurisdiction. The court repudiates attempting to pass upon the bondholders' rights under the funding acts of 1874, or upon the jurisdiction of the United States courts in the premises.

It is easy to see that judges holding under the Louisiana constitution of 1879 might feel powerless to carry out contracts which they consider are repudiated by that instrument. The attorney-general of Louisiana, in argument, takes the position that the state of Louisiana has declared that she does not owe these coupons of 1880, and that if her officers can be made to comply with the acts

of 1874, the eleventh amendment to the United States constitution is so much waste paper.

The first proposition is not true in fact, for the state of Louisiana has never declared that she does not owe these coupons; but, on the contrary, her indebtedness is admitted by the terms of the state debt ordinance, and the other proposition is *non sequitur*. Article 1, § 10, Const. "No state shall pass any law impairing the obligation of contracts," is the clause of that great instrument that is in danger of the waste basket if the constitution of Louisiana of 1879 is given the force that the representatives of the state claim for it. It seems to me that many of the doubts arising with regard to the ability of the court to grant relief come from following decisions rendered either with a view of maintaining the kingly prerogative, or respecting the rights of some independent sovereignty.

It is said that in England the arms of equity are short against the crown's prerogatives, and that they are short in this country against the sovereign. But the fact is that in this country no person or set of persons is above the law of the land, and in the courts of the United States "the arms of equity are never short" when the proper parties can be brought before the court, so that justice may be done according to equity and good conscience. It is not the interest of the state that defeats the case under the eleventh amendment. The court can grant relief in all cases where the state is not essentially necessary as a party. From what has been shown herein it seems that the court may not be powerless to grant final relief in this case, either by holding the fund now in the hands of the defendants to be a trust fund, and ordering the distribution thereof through a receiver, or, by a broader view of the case, enforcing the performance of the contract by mandatory injunction; and that, therefore, the preliminary injunction prayed for should be granted.

"If there be a *prima facie* or even a doubtful case shown, it is the interest of both parties that the interlocutory injunction should issue." Justice Grier, 3 Wall., Appendix, 791. See Justice Bradley in *Railroad Co. v. Drew*, 3 Woods, 676. "On a motion for a preliminary injunction the court is not bound to solve doubtful and difficult questions of law." *Parker v. Sears*, 1 Fish., 93. Particularly is this the case when nearly the identical question is now pending before the supreme court, whose decision I have no desire to forestall, but which the defendants may render nugatory unless the preliminary injunction is granted.

I think the injunction prayed for should issue, but I decide nothing further in this case than that this court has jurisdiction, under the bill as shaped, to prevent by injunction *pendente lite* the defendants from diverting the fund collected and set apart under the funding act of 1874, to pay the coupons of the consolidated bonds falling due January 1, 1880; and that such injunction ought to issue, to the end that the fund may be preserved intact until the rights of the parties and the interest of the state of Louisiana, if any she has, may be determined contradictorily.

The other questions discussed herein are open questions. Let the injunction issue *pendente lite*, and let the defendants demur, plead or answer, as counsel may advise, by the third Monday in April next.

BILLINGS, D. J., dissented, holding that the case was palpably beyond judicial cognizance. *Osborn v. Bank*, 9 Wheat., 738; *Georgia v. Madrazo*, 1 Pet., 122; *United States v. Peters*, 3 Dal., 121; *Allen v. Barida*, 7 Bosw., 712; *Crouch v.*

Credit Foncier, L. R., 8 Q. B., 384; Wadsworth v. Queen of Spain, 17 Q. B., 171; Murray v. Earl of Clarendon, L. R., 7 Eq. Cas., 11; Smith v. Wegulin, L. R., 7 Eq. Cas., 198; Twycross v. Dreyfus, L. R., 5 Ch. Div., 605; The Parliament Belge, L. R., 5 Prob. Div., 197; Briggs v. The Light Ships, 11 Allen, 157; Beers v. State, 20 How., 529, cited and reviewed.

UNITED STATES v. WICKERSHAM.

(Circuit Court for Tennessee: 10 Federal Reporter, 505-512. 1882.)

STATEMENT OF FACTS.—The United States leased a lot in Memphis, Tennessee, to defendant, for a term of five years, with the privilege of removing the buildings that he might erect upon it. Defendant having failed to pay his rent was ejected in March, 1876, and an agent of the United States (Smith) was put into possession. Pending the ejectment suit the United States had recovered a judgment for past-due rents, and had begun the present equity suit for the sequestration of the rents of the property, etc., in which suit a receiver had been appointed. When judgment was rendered in the ejectment suit a consent decree was entered in this suit by which the entire property was turned over to the United States, which was to rent out the property and apply the proceeds in payment of the past-due rents, etc. Smith, the agent in possession, from time to time filed reports in this cause of his collections, styling himself sometimes agent, sometimes receiver. His last report showed all arrears paid and a balance in his hands. Defendant moves for the appointment of a receiver and a reference to a master to take proof and state Smith's accounts, and charges Smith with neglect and wastefulness.

§ 698. *A federal court has no jurisdiction to give a money decree against the United States, nor to order accounts against its executive agents.*

Opinion by HAMMOND, J.

When this motion was first made it occurred to me that the court had no jurisdiction to grant it, or that it involved the exercise of authority beyond the power of the court to enforce, if the jurisdiction be conceded. It may be assumed that the United States, whenever it comes into this court and brings its suit against a citizen, consents to submit to and carry out whatever decrees may be lawfully made against it in the ordinary course of the legal procedure. But we have no jurisdiction here to decree against the United States for the delivery up of its property, or of that of the citizen in its possession, or to order accounts against its executive agents, or to decree the payment by them of the money of the United States.

§ 699. *Authorities reviewed.*

We certainly do not enforce contracts *against* the United States, although we have jurisdiction to enforce them in its favor. Section 1059 of the Revised Statutes enacts that: "The court of claims shall have jurisdiction to hear and determine the following matters: *First*, all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."

The case of United States v. Bostwick, 94 U. S., 53, was a suit in the court of claims founded upon a contract with the United States about the use and occupation of land and improvements thereon; and that of De Groot v. United States, 5 Wall., 420, was a suit in that court upon an arbitration award on a similar contract, though it was brought under a special act of congress, and held to be not properly brought on the award which had been abrogated by

congress. The court there says of the rule that the United States cannot be sued for a claim or demand against it without its consent: "This rule is carried so far by this court that it has been held that when the United States is plaintiff in one of the federal courts and the defendant has pleaded a set-off which the acts of congress have authorized him to rely on, no judgment can be rendered against the government, although it may be judicially ascertained that on striking a balance of just demands the government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of its courts and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defense."

In *United States v. Eckford*, 6 Wall., 484, there was a suit in the court of claims for a balance alleged to be due a collector who had been sued by the United States in a district court, and had pleaded, as the statute allowed him, a set-off. The verdict was against the United States, and the jury certified that there was due him from the United States the amount sued for in the court of claims. It was held that neither in the original suit nor in the court of claims could there be a judgment against the United States for the balance. The court says: "Where a party contracting with the United States is dissatisfied with the course pursued towards him by the officers of the government, charged with the fulfillment of the contract, his only remedy, except in the limited class of cases cognizable in the court of claims, is by petition to congress."

In *Schaumburg v. United States*, 103 U. S., 667, it was held not to be error, where the statute allows set-off to be pleaded, to refuse to find or certify a balance due from the government, although under some circumstances it may be proper to do so. It was said: "Claims for a credit can be used in suits against persons indebted to the United States to reduce or extinguish the debt, but not as a foundation of a judgment against the government."

In *Hall v. United States*, 91 U. S., 559, it is said: "Questions of the kind, where the United States is plaintiff, must be determined wholly by the acts of congress, as the local laws have no application in such cases." See, also, *Watkins v. United States*, 9 Wall., 759-765.

In the case of *The Siren*, 7 Wall., 152, it was said: "The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried the case, there is no distinction between suits against the government directly, and suits against its property."

And the court, proceeding, uses this language: "But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit they waive their exemption so far as to allow a presentation by the defendants of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem* they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except they are exempt from costs, and from affirmative relief against them, beyond the demand or property in controversy."

It was a case in which a prize vessel had damaged another by collision, the prize being in fault. When libeled at the suit of the United States in the prize court the owner of the damaged sloop intervened and claimed his damages, and it was held that he was entitled to them. The effect of the principle we are considering was elaborately examined on authority with the above result. It

was subsequently, in the case of *The Davis*, 10 Wall., 15, explained and confirmed. In that case a vessel and her cargo were libeled for salvage. The cargo belonged to the United States, but was not, when the suit was brought, in the actual possession of the United States, or its officers or agents, but in that of the master of the vessel, and the proceeds being in court, it was held that the claim for salvage could be enforced. The court said: "That rule . . . admits that the lien can only be enforced by the courts in a proceeding which does not require that the property shall be taken out of the possession of the United States. But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the courts? The possession which would do this must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process."

These cases are again further explained in *Case v. Terrell*, 11 Wall., 199, where it was adjudged that no judgment for money could be rendered against the United States in any court other than the court of claims without a special act of congress conferring jurisdiction, and that the appearance of the comptroller of the currency and a receiver of a bank appointed by him, submitting, through the district attorney, to the decision of the court in behalf of the United States, could not confer jurisdiction. And in *Carr v. United States*, 98 U. S., 433, they again came before the court, and their effect as adjudications was explained. It was there determined that the appearance of the district attorney and special counsel employed to represent the government in actions of ejectment brought against its agents in possession did not estop the government to deny the jurisdiction. So in *Hart v. United States*, 95 U. S., 316, it was ruled that the government is not responsible for the laches or wrongful acts of its officers or agents, and they cannot be set up as a defense in suits of the United States against a defendant.

§ 700. *Property in possession of the United States is not within the jurisdiction of the court in a direct suit against the government or its agent.*

These authorities, and many others I have consulted, appended in a note, (a) have confirmed me in the impression I first had that we have no jurisdiction to appoint a receiver of property in possession of the United States, no power to

(a) NOTE.—Consult *U. S. v. Thompson*, 98 U. S., 486, 489; *U. S. v. Gillis*, 95 U. S., 407, 412; *Avery v. U. S.*, 12 Wall., 304; *Bonner v. U. S.*, 9 Wall., 156; *Nations v. Johnson*, 24 How., 203; *Pennington v. Gibson*, 16 How., 65; *Reeside v. Walker*, 11 How., 272; *Hill v. U. S.*, 9 How., 386; *U. S. v. Brown*, 9 How., 487, 500; *U. S. v. Buchanan*, 8 How., 83, 105; *U. S. v. Boyd*, 5 How., 29; *Gratiot v. U. S.*, 4 How., 80, 112; *U. S. v. McLemore*, 4 How., 286; *Milner v. Metz*, 16 Pet., 221; *U. S. v. Robeson*, 9 Pet., 319; *U. S. v. Ringgold*, 8 Pet., 150; *U. S. v. Clark*, 8 Pet., 436; *U. S. v. McDaniel*, 7 Pet., 1; *U. S. v. Ripley*, 7 Pet., 18; *U. S. v. Fillebronne*, 7 Pet., 28; *The Antelope*, 12 Wheat., 546; *Hugh v. Higgs*, 8 Wheat., 697; *U. S. v. Barker*, 2 Wheat., 395; *U. S. v. Hooe*, 3 Cranch, 73; *U. S. v. La Vengeance*, 3 Dall., 297; *Meier v. Railway*, 4 Dill., 278; *U. S. v. Flint*, 4 Saw., 42; *U. S. v. Austin*, 2 Cliff., 325; *The Othello*, 5 Blatch., 342; *S. C.*, 1 Ben., 43; *U. S. v. Collins*, 4 Blatch., 142; *U. S. v. Davis*, 1 Deady, 294; *U. S. v. Smith*, 1 Bond, 68; *Wilder v. U. S.*, 3 Sumn., 303; *Mezes v. Greer*, 1 McAl., 401; *Elliott v. Van Voorst*, 3 Wall. Jr., 299; *Fendall v. U. S.*, 14 Court Claims, 297; *Goodman v. U. S.*, 6 Court Claims, 146; 5 Am. Law Reg., 253; 11 Law Rep. (Boston), 281.

enforce a surrender of it to a receiver, and no authority to call its agents into this court to account for its management of the property, no matter how the United States obtained the possession, whether through a decree of this court, in which it was a plaintiff, or otherwise. And in answer to the complaint that the court itself raised the objection, it may be said that the federal courts always decline jurisdiction on their own motion whenever it appears that they have no jurisdiction of the subject-matter in controversy. It is particularly the duty of all courts to do so where this prerogative of the government is involved. 8 Bac. Abr., tit. "Prerogative" (Bouv. ed., 1861), p. 106; *Barclay v. Russell*, 3 Ves. Jr. (Sumner's ed.), 424. The defendant seeks to bring this case within the principle of that of *The Siren*, *supra*. It was evidently clearly within that case when first instituted, and so long as the property remained *in custodia legis*, and was in possession of a receiver of this court, we had full jurisdiction; and, if it had been so kept, there would be now no trouble about the jurisdiction. But whenever the defendant allowed it to pass from the control of the court *as a fact*, and into the actual possession of the United States, all power to relieve him here ceased from that moment, no matter what the intention of the court was, or of the parties, nor what the proper construction of the decree may be, nor what the rights of the parties under it may require, as against the United States.

It is impossible, in the nature of the case, for this court to retain control over it while it is in the possession of the United States or *its* agents, or for this court to wrest it from that possession, however much the defendant may be entitled to have that done. It does not alter the case to treat the United States as a receiver; for a claim founded on any breach of its duty in that behalf is as much beyond our jurisdiction as any other. If the decree had contained a stipulation to do just what the defendant contends its proper construction requires, the result would have been the same. We cannot enforce the stipulation. If it had been one of the stipulations that the United States would hold for this court and pay according to its decrees, the same difficulty would exist. But I do not think the decree subject to such a construction, there being no stipulation to that effect. It was, in my judgment, a final decree evidencing a contract between the parties. There is no reservation of jurisdiction to enforce the decree, and if there were it could not be carried out here. As between private parties their conduct might be construed as continuing the case open to enforce the decree; but the government cannot be so bound by the acts of its officers, as I have shown.

There can be, in this case, no jurisdiction to enforce any personal liability of the collector of customs. He is not our receiver, and never was. He holds his possession under regulations of the treasury department and as its agent. His accounting here is voluntary, and his misapprehension of his relations in the premises cannot give us jurisdiction. It is plain the remedy of the defendant is by application to the executive department to carry out the stipulations of the decree, or to the court of claims to enforce them, or to congress to relieve him. Motion denied.

§ 701. A state may be sued in the supreme court of the United States, and under the constitution as first adopted an action of *assumpsit* would lie at the suit of a citizen of another state. Service would be made by leaving copies of the declaration on the governor and attorney-general. *Chisholm v. Georgia*, 2 Dal., 419.

§ 702. By the second section of the third article of the constitution the supreme court of the United States has original jurisdiction of a case where a state is a party. Where, how-

ever, a state is a party, not to assert some right as a sovereign state, but some right of property, it must appear that such a right is substantial and of such a nature as to support the jurisdiction. *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How., 559.

§ 703. A libel in admiralty against a state, alleging that the latter was in possession of slaves in which plaintiff had an interest, and which had been brought into the United States after an illegal capture, does not present a case where the property is brought within the jurisdiction of a court of admiralty, but is a mere personal suit against a state, and hence cannot be maintained. *Ex parte Madrazzo*,* 7 Pet., 627.

§ 704. Suit between state and one of its citizens.—The circuit courts have no jurisdiction, by reason of the character of the parties, in a suit between a state and one of its citizens. *North Carolina v. Trustees of University*,* 1 Hughes, 133.

§ 705. Where state is interested but is not a party.—The eleventh amendment to the constitution of the United States, providing that no suit can be prosecuted in the circuit court against a state by citizens of another state or by citizens or subjects of a foreign state, applies only to suits in which a state is a party to the record, not to those in which it has merely an interest. *Swasey v. North Carolina R. Co.*, 1 Hughes, 19.

§ 706. Suit against agent of state.—Although the courts have no jurisdiction of a suit against a state under the eleventh amendment of the federal constitution, yet they have jurisdiction of a suit against a corporation acting as agent of the state under an unconstitutional law. *Charles River Bridge v. Warren Bridge*, 11 Pet., 572 (CONST., §§ 2058-82).

§ 707. In suits where a state is not a party of record, but is a party in interest in the property which is the subject of the suit, and the property is in the hands of an agent of the state and within the jurisdiction of the federal circuit court, that court may take jurisdiction of the case, and, by decree directed to the agent, enforce the distribution of the property without making the state a party. *Swasey v. North Carolina R. Co.*, 1 Hughes, 19.

§ 708. Where a plaintiff brings suit to reach certain railway stocks, and a state has a substantial interest in those stocks, and the stocks are in the possession of its agent and within the jurisdiction of the court, the circuit court will take jurisdiction of the case, acting on the property through the agent, and not making the state a party to the record. *Ibid.*

§ 709. Suit against state officer.—When a state enters into a contract with certain of her creditors, and certain state officers, without authority of law, but acting under an unconstitutional law, are about to infringe the contract, a federal court has jurisdiction of a bill in equity against those officers to restrain such action, and the suit is not against the state in such a sense that it contravenes the eleventh amendment to the federal constitution. *McComb v. Board of Liquidation*, 2 Woods, 54; 2 Otto, 531.

§ 710. While the circuit court of the United States has no jurisdiction to entertain a suit against a state of the Union, it has jurisdiction of a suit against an officer of a state, who, under color of his office, but without lawful authority, is wasting, alienating or destroying a trust estate, although the state may be the trustee and remain silent. *Preston v. Walsh*, 10 Fed. R., 325.

§ 711. A circuit court of the United States may, in a proper case in equity, enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant. When the state is concerned, it should be made a party if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record. In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case. (Reaffirming *Osborn v. Bank of United States*, 9 Wheat., 738.) *Davis v. Gray*, 16 Wall., 203.

§ 712. As regards jurisdiction, a bill filed against the commissioner of the general land office of Texas, to restrain him from allowing locations of land within the limits of a grant made to a party under whom the complainant claimed, and which was afterwards confirmed by the state of Texas, is not a suit against the state. *Preston v. Walsh*, 10 Fed. R., 317.

§ 713. When the governor of a state which has granted land to a railroad company issues to other persons patents for land infringing on the railroad land grant, an injunction will be granted by a federal court to restrain the further issuing of such patents; and the fact that the bill is brought against the governor of a state does not make it demurrable under the eleventh amendment to the constitution forbidding suits against a state, for in this case the state is not technically a party. *Gray v. Davis*, 1 Woods, 425.

§ 714. When a state law imposing a tax has been declared unconstitutional and void by the supreme court of the United States, a party who is threatened by the state treasurer with

collection of the illegal tax, particularly if the collection threatened is by violence and not by process of law, may have an injunction from the circuit court upon the treasurer forbidding such collection. *Woolsey v. Dodge*, 6 McL., 145; 18 How., 331.

§ 715. A sum of money was in dispute, one of the claimants being the state of Pennsylvania. The money was paid to the state treasurer, who received it in his own name and gave a personal bond of indemnity. After his death suit was brought against his executrix to recover the money as wrongfully paid, and it was objected that this was a suit against a state and was forbidden by the eleventh amendment. *Held*, that the state had not possession of nor right to the property, and there could be no pretext that the case came within the eleventh amendment. *United States v. Peters*,* 5 Cr., 115.

§ 716. **Set-off against the United States.**—In a suit on the official bond of the defendant for a balance claimed to be due the government, it was held that the defendant could set up claims against the United State, so far as they were not prohibited by law, if they were just and equitable, although they may have been rejected by the proper officer, viz., the accounting officer. *United States v. Smith*,* 5 Am. L. Reg., 268.

§ 717. The government of the United States cannot be sued for a claim or demand against it without its consent. Nor, where it is plaintiff, can a judgment be rendered against it for a sum due by way of set-off, nor for costs expended by the defendant in his defense. *De Groot v. United States*,* 5 Wall., 419.

§ 718. **Injunction against United States.**—The United States obtained judgment against an individual and various executions issued, till more was paid than was due on the judgment. The circuit court then decreed a perpetual injunction against the United States, and that it should pay costs. On appeal the supreme court held that the circuit court had no authority to make such judgment, but might order a satisfaction to be entered on the judgment if on investigation it proved to be satisfied. *United States v. McLemore*, 4 How., 238.

§ 719. **Injunction against war department.**—Congress made an appropriation to improve a certain harbor, and committed the expenditure of the money and the direction of the work to the war department. *Held*, that this court had authority to restrain the war department and its agents by injunction from executing the law in an unconstitutional manner. *Avery v. Fox*, 1 Abb., 246. See GOVERNMENT; STATES.

IV. JURISDICTION OF THE SUPREME COURT.

[Appellate Jurisdiction, see APPEALS.]

SUMMARY — *Not excluded when state is party*, § 720.—*Between state and its citizens*, § 721.—*Original and appellate*, § 722.—*Against state as defendant in error*, § 723.—*Appeal from state court*, § 724.—*Laws of District of Columbia*, § 725.—*Between two states*, § 726.—*Boundary disputes*, §§ 727-729.—*Proceedings in default of defendant*, § 730.—*Land claimed to be in two states*, § 731.—*Contingent interest of a state*, § 732.—*Habeas corpus*, § 733.

§ 720. The jurisdiction of the supreme court is not excluded by the fact that one of the parties to the cause is a state. *Cohens v. Virginia*, §§ 734-745. See § 764.

§ 721. The supreme court has jurisdiction of a case arising under the constitution or laws of the United States, though the parties be a state and one of its own citizens. *Ibid*.

§ 722. Although the constitution has given the supreme court original jurisdiction in certain classes of cases, and appellate jurisdiction in others, the distinction between these two does not necessarily exclude the exercise of one where the other is given. *Ibid*.

§ 723. The eleventh amendment does not prevent a private individual sued by a state from bringing the case before the supreme court by writ of error, although the effect will be to make the state appear as defendant in error. *Ibid*.

§ 724. The appellate jurisdiction of the supreme court may be exercised over the judgment of a state court. *Ibid*.

§ 725. The acts of congress in legislating for the District of Columbia are laws of the United States, and within the meaning of the constitution, article 6, clause 2. *Ibid*.

§ 726. In suits between two states, the supreme court has jurisdiction, as far as the parties are concerned, by express grant in the constitution. *Rhode Island v. Massachusetts*, §§ 746-756.

§ 727. The case of a disputed boundary between two states forms no exception to the constitutional grant of original jurisdiction to the supreme court in cases "in which a state shall be a party." *Ibid*. See § 761.

§ 728. A controversy between two states as to the locality of a common boundary line is, since the adoption of the constitution, a judicial, not a political, question. *Ibid*.

§ 729. The supreme court, having determined the locality of a disputed boundary line between two states, has power to enforce its decree. *Ibid.*

§ 730. In the event of the failure of a defendant state to appear in a case within the jurisdiction of the supreme court, the plaintiff may proceed *ex parte*. *Ibid.*

§ 731. A suit to recover land between two parties, who claim respectively that the land is in Connecticut and in New York, is in no sense a suit between those states. *Fowler v. Lindsey*, §§ 757-759.

§ 732. A contingent interest of a state in the result of a suit does not give original jurisdiction to the supreme court, unless the state be nominally or substantially a party. *Ibid.*

§ 733. The supreme court has no power to issue writs of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given by the constitution or laws of the United States. *Ex parte Barry*, § 760.

[NOTES.— See §§ 761-786.]

COHENS *v.* VIRGINIA.

(6 Wheaton, 264-448. 1821.)

STATEMENT OF FACTS.— Cohens, the defendant below, was indicted in Virginia for selling lottery tickets, contrary to a statute of the state. He defended under a law of the United States, namely, the charter of the city of Washington, which authorized this lottery. An agreed statement of facts was made, and the sessions court of Norfolk, the highest state court having jurisdiction of the case, gave judgment against the defendant. The case came by writ of error before the supreme court, and a motion was made to dismiss for want of jurisdiction.

Opinion by MARSHALL, C. J.

This is a writ of error to a judgment rendered in the court of hustings, for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court the defendant claimed the protection of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded and the act of congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the acts of congress before mentioned were valid, and on the true construction of those acts the lottery tickets sold by the defendants as aforesaid might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or act of the general assembly of the state of Virginia prohibiting such sale is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them \$100 and costs."

Judgment was rendered against the defendants, and the court in which it was rendered being the highest court of the state in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ for want of jurisdiction. In support of this motion three points have been made and argued with the ability which the importance of the question merits. These points are: 1. That a state is a defendant. 2. That no writ of error lies from this court to a state court. 3. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the judiciary act. The court has bestowed all its attention on the arguments of both

gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the Union. That the constitution, laws and treaties may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry affirms that the decision he asks does not depend on inquiry. If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

§ 734. *The jurisdiction of the supreme court of the United States is not excluded by the fact that one of the parties to the cause is a state.*

1. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state? The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union. The counsel for the defendant in error have stated that the case which arises under the constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the

powers given in the constitution, of which the law of naturalization is mentioned as an example. The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution, in the twenty-fifth section of the judiciary act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent state is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides. The American states as well as the American people have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." This is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of

the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution, the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal courts is extended in consequence of the character of the parties. In that enumeration we find "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens or subjects."

One of the express objects, then, for which the judicial department was established is the decision of controversies between states, and between a state and individuals. The mere circumstance that a state is a party gives jurisdiction to the court. How, then, can it be contended that the very same instrument, in the very same section, should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a state a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary for the purposes of

justice to provide a tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a state is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument proving the necessity of the department proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration when we are inquiring whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole.

The answer which has been given to this argument does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the state institutions; and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them. We readily concur with the counsel for the defendant in the declaration that the cases which have been put, of direct legislative resistance for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope that they will never occur; but we cannot help believing that a general conviction of the total incapacity of the government to protect itself and its laws in such cases would contribute in no inconsiderable degree to their occurrence.

Let it be admitted that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different states may entertain different opinions on the true construction of the

constitutional powers of congress. We know that, at one time, the assumption of the debts contracted by the several states, during the war of our Revolution, was deemed unconstitutional by some of them. We know, too, that at other times, certain taxes imposed by congress have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of congress may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief if the first decisions in such cases should be final!

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the states was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of congress, under the confederation, were as constitutionally obligatory as the laws enacted by the present congress. That they were habitually disregarded is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system is its ability to act on individuals directly, instead of acting through the instrumentality of state governments. But ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the

laws, as well as to their coercion? Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?

The counsel for Virginia endeavor to obviate the force of these arguments by saying that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the states can put an end to the government by refusing to act. They have only not to elect senators, and it expires without a struggle.

It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will. It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the states, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws; and this it was the part of true wisdom to attempt. We think they have attempted it.

§ 735. *The supreme court has jurisdiction of a case between a state and one of its own citizens, if arising under the constitution or laws of the United States.*

It has been also urged, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal courts. The state tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last.

This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this

court could not establish the demand of a citizen upon his state, but is not entitled to the same force when urged to prove that this court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the second section of the third article which extends the judicial power to all cases arising under the constitution and laws of the United States would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power as originally given extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

§ 736. *Original and appellate jurisdiction of the supreme court. The grant of one in certain classes of cases does not necessarily exclude the other in the same classes. Constitution construed.*

It has been also contended that this jurisdiction, if given, is original, and cannot be exercised in the appellate form. The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." In all the other cases before mentioned, the supreme court shall have appellate jurisdiction. This distinction between original and appellate jurisdiction excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the supreme court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and

not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a state is a party; and to include in the second those in which jurisdiction is given because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations. That the constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the supreme court. In such a case the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause dividing the power of the supreme court, in such manner as in a considerable degree to defeat the power itself. All must perceive that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable that in this distributive clause no negative words are introduced. This observation is not made for the purpose of contending that the legislature may "apportion the judicial power between the supreme and inferior courts, according to its will." That would be, as was said by this court in the case of *Marbury v. Madison*, 1 Cranch, 137, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article. But, although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted that "affirmative words are often, in their operation, negative of other objects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created, then, we think, affirmative words ought not to be construed negatively.

The constitution declares that in cases where a state is a party the supreme court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded that where the case is of such a nature as to admit of its originating in the supreme court, it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it.

There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of the supreme court, but does not define that of the inferior courts. Can it be affirmed that a state might not sue the citizen of another state in a circuit court? Should the circuit court decide for or against its jurisdiction; should it dismiss the suit or give judgment against the state, might not its decision be revised in the supreme court? The argument is that it could not; and the very clause which is urged to prove that the circuit court could give no judgment in the case is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original, "in cases affecting ambassadors, other public ministers and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws and treaties of the United States." It has been generally held that the state courts have a concurrent jurisdiction with the federal courts in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words "to all cases" give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert in our prize courts the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

It is, we think, apparent that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation in

every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats, the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and perhaps every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

§ 737. — *Marbury v. Madison discussed.*

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of *Marbury v. Madison*.

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for *Marbury* had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly

have been useless to proceed further than to define the judicial power, and the tribunals in which it should be vested." The court says that such a construction would render the clause dividing the jurisdiction of the court into original and appellate totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case (in the case of *Marbury v. Madison*), a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible unless the words require it."

The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative; and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative or exclusive sense is to be so used as to defeat some of the great objects of the article. To this construction the court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

§ 738. — *various supposed cases distinguished and explained.*

The counsel who closed the argument put several cases for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the court. Were a state to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state to recover back the money? Perhaps not. Without, however, deciding such supposed case, we may say that it is entirely unlike that under consideration.

The citizen who has paid his money to his state under a law that is void is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the constitution than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the court

gives judgment against him. This would be a case arising under the constitution, and would be the very case now before the court.

We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property? If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the state for money which is not secured to him.

The case of a state which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal courts have no cognizance of the case. But suppose a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and, unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is, the grant by a state of a patent of nobility. The court, he says, cannot annul this grant. This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law,

that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the constitution, to which the judicial power does not extend.

We think, then, that as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws or treaties of the United States, was not arrested by the circumstance that a state was a party.

§ 739. *Effect of the eleventh amendment upon suits in which a state is a party.*

This leads to a consideration of the eleventh amendment. It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation. The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity

commenced or prosecuted against one of the United States, by citizens of another state," etc.

§ 740. — *suit defined.*

What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian: '*Jus prosequendi in judicio quod alicui debetur.*'" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the supreme court against some of the states before this amendment was introduced into congress, and others might be commenced before it should be adopted by the state legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a state by the citizen of another state. If a suit brought in one court and carried by legal process to a supervising court be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly, in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state.

§ 741. — *writ of error defined.*

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same, according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to anything, it may be released by the name of an action. In Bacon's Abridgment, tit. Error, L., it is laid down that "where, by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the posses-

sion of anything which is withheld from him, not when its operation is entirely defensive. This rule will apply to writs of error from the courts of the United States, as well as to those writs in England.

§ 742. — *effect of a writ of error is not to institute a new suit.*

Under the judiciary act (1 Stats. at Large, 73), the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law, and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made, by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such a writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands. But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the eleventh amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

§ 743. *The appellate power of the supreme court of the United States may be exercised over the judgment of a state court.*

2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court. This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a state; and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts with that constitutional relation which subsists between the government of the Union and the governments of those states which compose it.

Let this unreasonableness, this total incompatibility, be examined. That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared that, in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire — for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law

of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution? We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment nor revised after judgment, then the construction of the constitution, laws and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman, (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved. We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the supreme court appellate jurisdiction in all cases arising under the constitution, laws and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws. The framers of the constitution would naturally examine the state of things existing at the time, and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation by enlarging the powers of the government and by giving efficacy to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances we certainly should not expect to find in that instrument a diminution of the powers of the actual government.

Previous to the adoption of the confederation, congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government to establish tribunals for these appeals was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts to which the judicial power of the federal government extended. The confederation gave to congress the power "of establishing courts for receiving and determining finally appeals in all cases of captures." This power was uniformly construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation, than under the present constitution, and the states being much more completely sovereign, their institutions were much more independent.

The convention which framed the constitution, on turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the constitution, laws and treaties of the United States; and in a subsequent clause declare that in such cases the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws or treaties of the United States, from this appellate jurisdiction. Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it.

In discussing the extent of the judicial power the Federalist says: "Here another question occurs; what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the supreme court of the United States. The constitution, in direct terms, gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or

prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice and the rules of national decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the congress which passed that act were many eminent members of the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the supreme court appellate jurisdiction over the judgments of the state courts in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument it may be also material to observe that the uniform decisions of this court on the point now under consideration have been assented to, with a single exception, by the courts of every state in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal. This concurrence of statesmen, of legislators and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it the counsel who made this point has presented, in a great variety of forms, the idea already noticed, that the federal and state courts must, of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia. But it has been already shown that neither of these consequences necessarily follows. The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts which may conflict with the constitution, laws or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court still derives its authority from that state; the other still derives its authority from the nation.

If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all cases enumerated in the third article of the consti-

tution, a complete consolidation of the states, so far as respects judicial power, is produced. But certainly the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the states, so far as respects the judicial power," would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power and that of giving appellate jurisdiction in a few specified cases, in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit; a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union and of the great fundamental principles on which the fabric stands. To this argument in all its forms the same answer may be given. Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined, and we think the result must be that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question, then, must depend on the words themselves, and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*, 1 Wheat., 304.

§ 744. *The acts of congress in legislating for the District of Columbia are laws of the United States, and within the meaning of the constitution, article 6, clause 2.*

3. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case. The cause was argued in the state court on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets (2 Stats. at Large, 726), which is set forth, and further states the act of congress by which the city of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the court the questions, Whether the act of congress be valid? Whether, on its just construction, it constitutes a bar to the prosecution? and, Whether the act of assembly on which the prosecution is founded be not itself invalid? These questions were decided against the operation of the act of congress, and in favor of the operation of the act of the state.

If the twenty-fifth section of the judiciary act be inspected, it will at once be perceived that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of congress, on which the plaintiff in error relies, is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article. In the enumeration of the powers of congress, which is made in the eighth section of

the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District they necessarily preserve the character of the legislature of the Union, for it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The second clause of the sixth article declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land." The clause which gives exclusive jurisdiction is unquestionably a part of the constitution, and as such binds all the United States. Those who contend that acts of congress made in pursuance of this power do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of congress clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on and exercised by congress as the legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition that congress, when legislating for the District, assumed a distinct character and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten mile square, by a reference to the complex character of this court. It is, they say, a court of common law and a court of equity. Its character when sitting as a court of common law is as distinct from its character when sitting as a court of equity as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they were never confounded with each other. Without inquiring how far the union of different characters in one court may be applicable, in principle, to the union in congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity, that a mere inspection of the record gives decisive information of the character in which the courts sits, and consequently of the extent of its powers. But if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

Since congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be anything in the nature of this exclusive legislation which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made. Connected with the power to legislate within this District is a similar power in forts, arsenals, dock-yards, etc. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states. In the act for the punishment of crimes against the United States, section 3 (1 Stat. at Large, 113), murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus congress legislates, in the same act, under its exclusive and its limited powers.

The act, section 4, proceeds to direct that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered. Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which congress acts when exercising its powers of exclusive legislation.

If congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort or other place in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offense be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to or tried in any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished who, within that jurisdiction, shall rescue the body?

Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised throughout the Union, because the principal power is given to that body as the legislature of the Union. So in the same act, section 6, a person who, having knowledge of the commission of murder or other felony, on the high seas, or within any fort, arsenal, dockyard, magazine, or other place or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, etc., he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, etc.

It is clear that congress cannot punish felonies generally; and, of consequence, cannot punish misprision of felony. It is equally clear that a state legislature, the state of Maryland, for example, cannot punish those who, in another state, conceal a felony committed in Maryland. How then is it that congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it? The solution and the only solution of the difficulty is, that the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offense might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort or other place in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, that congress is not a local legislature, but exercises this particular power, like all its other

powers, in its high character as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the District or not depends on the words of that law. If it be designed so to operate, then the question whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of congress directs that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties," etc.

The whole merits of this case, then, consist in the construction of the constitution and the act of congress. The jurisdiction of the court, if acknowledged, goes no further. This we are required to do without the exercise of jurisdiction. The counsel for the state of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both, and seem, therefore, rather calculated to sustain their cause upon its merits, than to prove a failure of jurisdiction in the court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the court is unanimously of opinion that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

OPINION ON THE MERITS.

§ 745. *The act of congress authorizing the corporation of the city of Washington to draw lotteries for public purposes does not authorize the sale of tickets in states where such sales are illegal.*

Opinion by MARSHALL, C. J.

This case was stated in the opinion given on the motion for dismissing the writ of error for want of jurisdiction in the court. It now comes on to be decided on the question whether the borough court of Norfolk, in overruling the defense set up under the act of congress, has misconstrued that act. It is in these words: "The said corporation shall have full power to authorize the drawing of lotteries for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish: Provided, that the sum to be raised in each year shall not exceed the amount of \$10,000. And provided also, that the object for which the money is intended to be raised shall be first submitted to the president of the United States, and shall be approved of by him."

Two questions arise on this act. 1. Does it purport to authorize the corporation to force the sale of these lottery tickets in states where such sales may be prohibited by law? If it does, 2. Is the law constitutional?

If the first question be answered in the affirmative, it will become necessary to consider the second. If it should be answered in the negative, it will be

unnecessary, and consequently improper, to pursue any inquiries which would then be merely speculative respecting the power of congress in the case. In inquiring into the extent of the power granted to the corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the city. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised within the city. The subject on which congress was employed when framing this act was a local subject; it was not the establishment of a lottery, but the formation of a separate body for the management of the internal affairs of the city, for its internal government, for its police. Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects solely. In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the city alone, to the action of the being they were creating within the city, and not to any extraterritorial operations. In describing the powers of such a being, no words of limitation need be used. They are limited by the subject. But if it be intended to give its acts a binding efficacy beyond the natural limits of its power, and within the jurisdiction of a distinct power, we should expect to find, in the language of the incorporating act, some words indicating such intention.

Without such words we cannot suppose that congress designed to give to the acts of the corporation any other effect beyond its limits than attends every act having the sanction of local law, when anything depends upon it which is to be transacted elsewhere. If this would be the reasonable construction of corporate powers generally, it is more especially proper in a case where an attempt is made so to exercise those powers as to control and limit the penal laws of a state. This is an operation which was not, we think, in the contemplation of the legislature while incorporating the city of Washington. To interfere with the penal laws of a state, where they are not leveled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed.

An act such as that under consideration ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable. We do not think it essential to the corporate power in question that it should be exercised out of the city. Could the lottery be drawn in any state of the Union? Does the corporate power to authorize the drawing of a lottery imply a power to authorize its being drawn without the jurisdiction of a corporation, in a place where it may be prohibited by law? This, we think, would scarcely be asserted. And what clear legal distinction can be taken between a power to draw a lottery in a place where it is prohibited by law and a power to establish an office for the sale of tickets in a place where it is prohibited by law? It may be urged that the place where the lottery is drawn is of no importance to the corporation, and therefore the act need not be so construed as to give power over the place, but that the right to sell tickets throughout the United States is of importance, and therefore ought to be implied. That the power to sell tickets in every part of the United States might facilitate their sale is not to be denied; but it does not follow that congress designed, for the purpose of giving this increased facility, to

overrule the penal laws of the several states. In the city of Washington, the great metropolis of the nation, visited by individuals from every part of the Union, tickets may be freely sold to all who are willing to purchase. Can it be affirmed that this is so limited a market that the incorporating act must be extended beyond its words, and made to conflict with the internal police of the states, unless it be construed to give a more extensive market?

It has been said that the states cannot make it unlawful to buy that which congress has made it lawful to sell. This proposition is not denied; and therefore the validity of a law punishing a citizen of Virginia for purchasing a ticket in the city of Washington might well be drawn into question. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery tickets in Virginia is of a different character. Before we can impeach its validity, we must inquire whether congress intended to empower this corporation to do any act within a state which the laws of that state might prohibit? In addition to the very important circumstance that the act contains no words indicating such intention, and that this extensive construction is not essential to the execution of the corporate power, the court cannot resist the conviction that the intention ascribed to this act, had it existed, would have been executed by very different means from those which have been employed.

Had congress intended to establish a lottery for those improvements in the city which are deemed national, the lottery itself would have become the subject of legislative consideration. It would be organized by law, and agents for its execution would be appointed by the president, or in such other manner as the law might direct. If such agents were to act out of the District there would be, probably, some provision made for such a state of things, and in making such provisions congress would examine its power to make them. The whole subject would be under the control of the government, or of persons appointed by the government. But in this case no lottery is established by law, no control is exercised by the government over any which may be established. The lottery emanates from a corporate power. The corporation may authorize or not authorize it, and may select the purposes to which the proceeds are to be applied. This corporation is a being intended for local objects only. All its capacities are limited to the city. This, as well as every other law it is capable of making, is a by-law, and, from its nature, is only co-extensive with the city. It is not probable that such an agent would be employed in the execution of a lottery established by congress; but when it acts, not as the agent for carrying into effect a lottery established by congress, but in its own corporate capacity, from its own corporate powers, it is reasonable to suppose that its acts were intended to partake of the nature of that capacity and of those powers; and, like all its other acts, be merely local in its nature.

The proceeds of these lotteries are to come in aid of the revenues of the city. These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose that the president's house, the capitol, the navy yard or other public institution was to be benefited by these lotteries, or was to form a charge on the city revenue. Coming in aid of the city revenue they are of the same character with it, the mere creature of a corporate power. The circumstances that the lottery cannot be drawn without the permission of the president, and that this resource is to be used only for important improvements, have been relied on as giving to this corporate power a more extensive operation than is given to those with which

it is associated. We do not think so. The president has no agency in the lottery. It does not originate with him, nor is the improvement to which its profits are to be applied to be selected by him. Congress has not enlarged the corporate power by restricting its exercise to cases of which the president might approve. We very readily admit that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any state to defeat the loan authorized by congress would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which congress may adopt. These, and all other laws relative to the District, have the authority which may be claimed by other acts of the national legislature, but their extent is to be determined by those rules of construction which are applicable to all laws. The act incorporating the city of Washington is, unquestionably, of universal obligation; but the extent of the corporate powers conferred by that act is to be determined by those considerations which belong to the case.

Whether we consider the general character of a law incorporating a city, the objects for which such law is usually made, or the words in which this particular power is conferred, we arrive at the same result. The corporation was merely empowered to authorize the drawing of lotteries, and the mind of congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the court that the law cannot be construed to embrace it.

Judgment affirmed.

STATE OF RHODE ISLAND v. STATE OF MASSACHUSETTS.

(12 Peters, 657-762. 1838.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—At the January term of this court, 1832, the plaintiff filed a bill in equity, presenting a case arising under the various charters from the crown of England to the Plymouth Company in 1621; to Massachusetts in 1629; to Rhode Island in 1663; the new charter to Massachusetts in 1691; together with sundry intermediate proceedings of the council of Plymouth; the result of which was to vest in the colony of Massachusetts and the king all the rights of propriety and government previously granted to that company as a political corporation. The bill also set out the repeal of the original charter of Massachusetts on a *scire facias* in the court of chancery in England, the grant by the crown and acceptance by the colony of a new charter, subsequent to the charter to Rhode Island. All these acts are specially and at large set out in the bill, but need not in this stage of the cause be referred to by the court in detail. They present the claim of the plaintiff to the territory in controversy between the two states, in virtue of these charters, according to the boundaries therein described.

Independently of the claim under the charter of 1663, the plaintiff asserts a previous right in virtue of grants from the Indians, and settlements made under a title thus acquired; and also asserts that under both titles the inhabitants of Rhode Island made settlements on the lands immediately south of the boundary between the two colonies as now asserted; which settlements were so made and continued from the time of the purchase from the Indians, before,

under the charter, and afterwards, though the line was not defined and disputed. The bill then proceeds to state the existence of controversies between the two colonies, at a very early period, to settle which commissioners were appointed by each colony in 1709, and at various other periods down to 1809; and sets forth the proceedings of the commissioners of the colonies before the Revolution, and the states afterwards, down to 1818.

For the present purposes of this case, it is necessary to refer only to one subject-matter of these proceedings during this whole period, which is presented in the bill in the same aspect throughout; that subject is the agreement of 1709 and 1718, and the acts done pursuant thereto, which are recited at large in the bill. It then states the agreement of the commissioners of the two colonies, that a line should be run and marked as their boundary, which was done; a survey made and returned, together with all the proceedings, to the legislatures of the respective colonies, accepted by Massachusetts, but, as the bill avers, not accepted and ratified by Rhode Island. This is the line now claimed by Massachusetts; and whether the charter line, or that, is the true line of right and boundary between the two states, is the only point in controversy in this case.

The bill avers that this line was agreed on in consequence of a representation by the Massachusetts commissioners to those of Rhode Island, that in 1642, Woodward and Saffrey had ascertained the point three miles south of Charles river, which by the charters of both colonies was to form their common boundary by a line to run east and west therefrom. That Woodward and Saffrey had set up a stake at that point on Wrentham Plains, as the true southern boundary of Massachusetts. That the Rhode Island commissioners, confiding in such representation, believing that such point had been truly ascertained, and that such state was no more than three miles from Charles river, south, entered into and made the agreement of 1710-11, which was executed by the commissioners on both sides. In the agreement is this clause: That the stake set up by Woodward and Saffrey, approved artists, in 1642, and since that often renewed, in lat. $41^{\circ} 55' N.$, being three English miles south of Charles river, in its southernmost part, agreeably to the letters-patent to Massachusetts, be accounted and allowed as the commencement of the line between the colonies, and continued between them as deciphered in the plan of Woodward and Saffrey, on record in the Massachusetts government.

It is then averred in the bill, that no mark stake or monument then existed (1710-11) by which the place at which Woodward and Saffrey were alleged to have set up the stake could be ascertained; that none of the parties to the agreement went to such place; that no survey was made, no line run, or any means taken to ascertain where it was; whether it was three miles or more from Charles river; whether Woodward and Saffrey ever run the line, or whether it was the true boundary line between the colonies, according to their respective charters. That Massachusetts took wrongful possession of the territory in question, in which Rhode Island never acquiesced, and to which she never agreed; but continued to assert her claim, from the time of the agreement to the filing of the bill, to all the territory embraced in her charter, and sovereignty and jurisdiction within and over it, as claimed in the bill. The bill denies that any line was ever run by Woodward and Saffrey in 1642; avers that the agreements of 1710-11, which adopted it, were unfair, inequitable, executed under a misrepresentation and mistake as to material facts; that the line is not run according to the charters of the colonies; that it is more than

seven miles south of the southernmost part of Charles river; that the agreement was made without the assent of the king; that Massachusetts has continued to hold wrongful possession of the disputed territory, and prevents the exercise of the rightful jurisdiction and sovereignty of Rhode Island therein. The prayer of the bill is to ascertain and establish the northern boundary between the states, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs, and they be quieted in the enjoyment thereof, and their title; and for other and further relief.

On the service of this bill on the governor and attorney-general of Massachusetts, agreeable to a rule of this court, the legislature passed a resolution, authorizing the appearance of the state to the suit, and the employment of counsel, by the governor, to defend the rights of the state. In obedience to this resolution the governor, after reciting it, appointed counsel under the seal of the state, to appear and make defense, either by objecting to the jurisdiction of this court, or by plea, answer or otherwise, at his discretion, as he should judge most proper.

Under this authority an appearance was entered; and at January term a plea in bar of the plaintiff's bill was filed, in which it was averred that, in 1642, a station or monument was erected and fixed at a point believed to be on the true southern boundary line of Massachusetts, and a line continued therefrom to the Connecticut river, westwardly; which station or monument was well known, notorious, and has ever since been called Woodward and Saffrey's station, on Wrentham Plains. It then sets up the agreement of 1709, and subsequent proceedings at large; avers that the whole merits of plaintiff's case, as set forth in the bill, were fully heard, tried and determined, in the hearing and by the judgment of the Rhode Island commissioners; that the agreement was fair, legal and binding between the parties; that it was a valid and effectual settlement of the matter in controversy, without cover, fraud or misrepresentation, with a full and equal knowledge of all circumstances by both parties. That such agreement is still in full force, no way waived, abandoned or relinquished, and that the defendant has held, possessed, occupied and enjoyed the land, propriety and jurisdiction, according to the well known and easily discovered station of Woodward and Saffrey, and the line run by them therefrom, from the date of the agreement to the present time, without hindrance or molestation.

The plea then sets forth the subsequent agreement of the two colonies, 1717 and 1718, touching their boundaries and a running and marking thereof by their respective commissioners appointed for the purpose of finally settling the controversy, who, in 1718, agreed that the stake of Woodward and Saffrey should be the point from which the dividing line should be run, and be forever the boundary between the two governments, notwithstanding any former controversy or claim. That this agreement was recorded, ratified and confirmed by the general assembly of Rhode Island; that no false representation was made to their commissioners; that the agreement was concluded fairly, in good faith, with full and equal knowledge by the respective parties, has never been annulled, rescinded or abandoned, and was in pursuance and completion of the agreement of 1709. The report of the commissioners is then set out, stating that in 1719 they run and marked a line west two degrees south from the stake of Woodward and Saffrey, at which they met, as the boundary; which report was approved by Rhode Island in the same year. The plea then makes the same averment as to these proceedings of 1717, 1718 and 1719, as it

did in relation to those of 1709, 1710 and 1711; pleads both agreements and unmolested possession by the defendant from their respective dates to the present time as a bar to the whole bill, and against any other or further relief therein; prays the judgment of the court whether the defendant shall make any further answer to the bill, and to be dismissed.

Then the defendant, not waiving but relying on his plea, by way of answer and in support of the plea as a bar to the bill, avers that both agreements were a valid and effectual settlement of the whole matter of controversy in the case as is insisted on in the plea. To this plea a replication was put in but afterwards withdrawn, and notice given that the cause would be put down for hearing on the plea; the cause was continued at the last term; the plaintiff gave notice that he should at this term move to amend the bill, and the case is now before us for consideration, on a motion by the defendant to dismiss the bill for want of jurisdiction in the cause.

§ 746. *Jurisdiction defined.*

However late this objection has been made, or may be made in any cause in an inferior or appellate court of the United States, it must be considered and decided before any court can move one further step in the cause, as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether on the case before a court their action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. 6 Pet., 709; 4 Russ., 415; 3 Pet., 203-7.

§ 747. *The question of jurisdiction may be raised in the United States courts by a simple motion to dismiss.*

A motion to dismiss a cause pending in the courts of the United States is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject-matter whether the jurisdiction shall be exercised by a court of law or equity; but that court to which it appropriately belongs can act judicially upon the party and the subject of the suit, unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case when nothing appears to the contrary; hence has arisen the rule that the party claiming an exemption from its process must set out the reasons by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case; otherwise the superior court must proceed in virtue of its general jurisdiction. This rule prevails both at law and in equity. 1 Ves. Sen., 204; 2 Ves. Sen., 307; Mit., 183. A motion to dismiss, therefore, cannot be entertained, as it does not and cannot disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. A plaintiff in law or equity is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a

second plea to the jurisdiction of that court to which he has driven the plaintiff by his plea. 1 Ves. Sen., 203. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery; that the subject-matter is cognizable only by the king in council, and not by any judicial power (1 Ves. Sen., 445), or that the parties defendant cannot be brought before any municipal court on account of their sovereign character and the nature of the controversy (as 1 Ves. Jr., 371, 387; 2 Ves. Jr., 56, 60); or in the very common cases which present the question, whether the cause properly belongs to a court of law or equity. To such cases a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court; the objection goes to a denial of any jurisdiction of a municipal court in one class of cases, and to the jurisdiction of any court of equity or of law in the other; on which last, the court decides according to their legal discretion. An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue. 10 Pet., 473; Toland v. Sprague, 12 Pet., 300. But when the objection goes to the power of the court over the parties, or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in law or equity, the ground of the objection is not taken by plea in abatement, as an exception of the given case from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing, unless it goes to the manner of bringing the defendant into court, which is waived by submission to the process.

As a denial of jurisdiction over the subject-matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction; a motion like the present could not be sustained consistently with the principles of its constitution. But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. 10 Pet., 474; S. P., 4 Russ., 415. And whether the want or excess of power is objected by a party, or is apparent to the court, it must surcease its action, or proceed extrajudicially.

§ 748. *In suits between two states, the supreme court has jurisdiction, as far as the parties are concerned, by express grant in the constitution.*

Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this court, through a long series of years and cases, to the present term; during which, in the case of *The Bank of the United States v. Daniel*, 12 Pet., 32, this court has declared this to be a fundamental principle of the constitution; and so we shall consider it in deciding on the present motion. 2 Pet., 590, 91.

Those states in their highest sovereign capacity, in the convention of the people thereof, on whom, by the Revolution, the prerogative of the crown and the transcendent power of parliament devolved, in a plenitude unimpaired by

any act, and controllable by no authority (6 Wheat., 651; 8 Wheat., 584, 88), adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution it was ordained that this judicial power, in cases where a state was a party, should be exercised by this court as one of original jurisdiction. The states waived their exemption from judicial power (6 Wheat., 378, 80), as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority, as their agent for executing the judicial power of the United States in the cases specified. Massachusetts has appeared, submitted to the process in her legislative capacity, and pleaded in bar of the plaintiff's action certain matters on which the judgment of the court is asked; all doubts as to jurisdiction over the parties are thus at rest, as well by grant of power by the people as the submission of the legislature to the process, and calling on the court to exercise its jurisdiction on the case presented by the bill, plea and answer.

§ 749. *The supreme court has jurisdiction in cases of disputed boundary between states. Constitution construed.*

Our next inquiry will be whether we have jurisdiction of the subject-matters of the suit, to hear and determine them. That it is a controversy between two states cannot be denied; and though the constitution does not, in terms, extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power. The solution of this question must necessarily depend on the words of the constitution, the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states, together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the constitution. It was necessarily left to the legislative power to organize the supreme court, to define its powers consistently with the constitution as to its original jurisdiction, and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial as well as all other departments and officers of the government of the United States. 3 Wheat., 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power (1 Wheat., 326; 4 Wheat., 407), leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power must, therefore, be made by laws passed by congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them would be probable, if not unavoidable, under a constitution of govern-

ment which made it the duty of the judicial power to decide all cases in law or equity arising under it, or laws passed and treaties made by its authority.

By the judiciary act of 1789 (1 Stat. at Large, 73) the judicial system of the United States was organized, the powers of the different courts defined, brought into action, and the manner of their exercise regulated. The thirteenth section provided: "That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction." 1 Story's Laws, 59.

The power of congress to make this provision for carrying into execution the judicial power in such cases has never been, and, we think, cannot be questioned; and, taken in connection with the constitution, presents the great question in this cause, which is one of construction appropriate to judicial power, and exclusively of judicial cognizance, till the legislative power acts again upon it. *Vide* 3 Pet., 203. In deciding whether the present case is embraced or excluded by the constitution and judiciary act, and whether it is a case of lawful original cognizance by this court, it is the exercise of jurisdiction; for it must be in the legal discretion of the court to retain or dismiss the bill of the plaintiffs. Act as we may feel it our duty to do, there is no appeal from our judgment, save to the amending power of the constitution, which can annul not only its judgments, but the court itself. So that the true question is, necessarily, whether we will so exercise our jurisdiction as to give a judgment on the merits of the case as presented by the parties, who are capable of suing and being sued in this court, in law or equity, according to the nature of the case and controversy between the respective states. This court, in construing the constitution as to the grants of powers to the United States, and the restrictions upon the states, has ever held that an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition, and have laid it down as a general rule, that, where no exception is made in terms, none will be made by mere implication or construction. 6 Wheat., 378; 8 Wheat., 489, 490; 12 Wheat., 438; 9 Wheat., 206, 207, 216.

Then, the only question is whether this case comes within the rule, or presents an exception, according to the principles of construction adopted and acted on by this court in cases involving the exposition of the constitution and laws of the United States, which are construed as other instruments granting power or property. 12 Wheat., 437; 6 Pet., 738, 740. That some degree of implication must be given to words is a proposition of universal adoption; implication is but another term for meaning and intention, apparent in the writing or judicial inspection: "The evident consequence" (1 Bl. Com., 250); "or some necessary consequence resulting from the law" (2 Ves. Sr., 351); or the words of an instrument, in the construction of which the words, the subject, the context, the intention of the person using them, are all to be taken into view. 4 Wheat., 415; 6 Pet., 739, 741. Such is the sense in which the common expression is used in the books: "Express words or necessary implication," such as arise on the words, taken in connection with other sources of construction; but not by conjecture, supposition, or mere reasoning on the meaning or intention of the writing. All rules would be subverted if mere extraneous matter should have the effect of interpreting a supreme law differently from its obvious or necessarily to be implied sense (*vide* 9 Wheat., 188, etc.), so apparent as to overrule the words used. 6 Wheat., 380. "Controversies between

two or more states," "all controversies of a civil nature where a state is a party," are broad, comprehensive terms, by no obvious meaning or necessary implication excluding those which relate to the title, boundary, jurisdiction or sovereignty of a state. 6 Wheat., 378.

The judiciary act makes certain exceptions which apply only to cases of private persons, and cannot embrace a case of state against state. Established rules forbid the extension of the exception to such cases, if they are of a civil nature. What, then, are "controversies of a civil nature," between state and state, or more than two states?

We must presume that congress did not mean to exclude from our jurisdiction those controversies, the decision of which the states had confided to the judicial power, and are bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions. In the construction of the constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted (12 Wheat., 354; 6 Wheat., 416; 4 Pet., 431-2), to ascertain the old law, the mischief and the remedy. It is a part of the public history of the United States, of which we cannot be judicially ignorant, that, at the adoption of the constitution, there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies. New Hampshire and New York contended for the territory which is now Vermont, until the people of the latter assumed by their own power the position of a state, and settled the controversy by taking to themselves the disputed territory, as the rightful sovereign thereof. Massachusetts and Rhode Island are now before us; Connecticut claimed part of New York and Pennsylvania. She submitted to the decree of the council of Trenton, acting pursuant to the authority of the confederation, which decided that Connecticut had not the jurisdiction; but she claimed the right of soil till 1800. New Jersey had a controversy with New York, which was before this court in 1832; and one yet subsists between New Jersey and Delaware. Maryland and Virginia were contending about boundaries in 1835, when a suit was pending in this court; and the dispute is yet an open one. Virginia and North Carolina contended for boundary till 1802; and the remaining states, South Carolina and Georgia, settled their boundary in the April preceding the meeting of the general convention which framed and proposed the constitution. 1 Laws U. S., 466. With the full knowledge that there were, at its adoption, not only existing controversies between two states singly, but between one state and two others, we find the words of the constitution applicable to this state of things, "controversies between two or more states." It is not known that there were any such controversies then existing, other than those which relate to boundary; and it would be a most forced construction to hold that these were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on other subjects. This becomes the more apparent when we consider the context and those parts of the constitution which bear directly on the boundaries of states, by which it is evident that there remained no power in the contending states to settle a controverted boundary between themselves, as states competent to act by their own authority on the subject-matter, or in any department of the government, if it was not in this.

By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into "any treaty,

alliance or confederation;" no power under the government could make such an act valid, or dispense with the constitutional prohibition. In the next clause is a prohibition against any state entering "into any agreement or compact with another state, or with a foreign power, without the consent of congress, or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay." By this surrender of the power which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plenitude of their sovereignty they might, they could settle them neither by war, or in peace by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent, being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger*, 11 Pet., 209, whereby their compacts became of binding force, and finally settled the boundary between them, operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true real boundaries. 11 Pet., 209; S. P., 1 Ves. Sr., 448-9; 12 Wheat., 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Irvine v. Sims*, 3 Dal., 425-54; and in *Marlatt v. Silk*, 11 Pet., 2, 18; *Burton v. Williams*, 3 Wheat., 529-33, etc.

In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress for its consent, its giving its consent, and the action of this court upon them, it is most manifest that, by universal consent and action, the words "agreement" and "compact" are construed to include those which relate to boundary, yet that word boundary is not used. No one has ever imagined that compacts of boundary were excluded because not expressly named; on the contrary, they are held by the states, congress and this court, to be included by necessary implication; the evident consequence resulting from their known object, subject-matter, the context and historical reference to the state of the times and country. No such exception has been thought of, as it would render the clause a perfect nullity for all practical purposes; especially the one evidently intended by the constitution in giving to congress the power of dissenting to such compacts. Not to prevent the states from settling their own boundaries, so far as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other states of the Union and the federal government, which might be injuriously affected if the contracting states might act upon their boundaries at their pleasure.

Every reason which has led to this construction applies with equal force to the clause granting to the judicial power jurisdiction over controversies between states, as to that clause which relates to compacts and agreements; we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them, nor refuse to include them within one general term when they have uniformly been included in another. Controversies about boundary are more serious in their consequences upon the contending states and their relations to the Union and governments, than com-

pacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power, the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree or fight with its adversary without the consent of congress; a resort to the judicial power is the only means left for legally adjusting or persuading a state which has possession of disputed territory, to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.

There can be but two tribunals under the constitution who can act on the boundaries of states—the legislative or the judicial power; the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court when a state is a party, the power is here, or it cannot exist. For these reasons we cannot be persuaded that it could have been intended to provide only for the settlement of boundaries when states could agree, and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement.

There is another clause in the constitution which bears on this question. The judicial power extends to “controversies between citizens of different states,” “between citizens of the same state claiming lands under grants of different states.” We cannot but know, judicially, that the latter classes of cases must necessarily arise on boundary, and that few, if any, ever arise from any other source. If there is a compact between the states, it settles the line of original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested; if there is no compact, then the controversy must be settled by adjudging where the line of boundary ought to be, by the laws and rules appropriate to the case. 6 Wheat., 393; 2 Pet., 300. It is not recollected that any such cases have ever arisen “between citizens of the same state,” as the judiciary acts have made no provision for this exercise of this undoubted constitutional jurisdiction; and it is not necessary for the decision of this cause, to inquire whether a law is necessary for this purpose. But for the other class of cases, “controversies between citizens of different states,” the eleventh section of the judiciary act makes provision; and the circuit courts in their original, and this court in its appellate, jurisdiction, have decided on the boundaries of the states, under whom the parties respectively claim, whether there has been a compact or not. The jurisdiction of the circuit court in such cases was distinctly and expressly asserted by this court as early as 1799, in *Fowler v. Lindsey*, 3 Dal., 411, 12 (§§ 757–759, *infra*); S. P., 5 Pet., 290. In *Handly v. Anthony*, 5 Wheat., 374, the circuit court of Kentucky decided on the boundary between that state and Indiana, in an ejectment between these parties, and their judgment was affirmed by this court. 5 Wheat., 375; 3 *id.*, 212–18; S. P., *Harcourt v. Gaillard*, 12 *id.*, 523. When the boundaries of states can be thus decided collaterally in suits between individuals, we cannot, by any just rule of interpretation, declare that this court

cannot adjudicate on the question of boundary, when it is presented directly in a controversy between two or more states, and is the only point in the cause.

§ 750. — *mode of adjusting boundary disputes under the confederation.*

There is yet another source of reference from which to ascertain the true construction of the constitution. By the ninth article of the confederation adopted by the legislatures of the several states, it is provided "that the United States, in congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or which may hereafter arise, between two or more states concerning boundary, jurisdiction, or any other cause whatever." It directed the appointment of a tribunal whose judgment should be final and conclusive. It also gave to congress power to appoint a judicial tribunal to decide on a petition of either of the parties claiming land under grants of two or more states who had adjusted their boundaries, but had previously made the grants on which the controversy arose. One of the most crying evils of the confederation was that it created no judicial power without the action of congress, and confined the power of that body to the appointment of courts for the trial of piracies and felonies committed on the high seas, for determining finally on appeal in all cases of captures, and for the adjustment of the controversies before referred to. Yet, defective as was the confederation in other respects, there was full power to finally settle controverted boundaries in the two cases, by an appeal by a state or petition of one of its citizens. This power was given from the universal conviction of its necessity, in order to preserve harmony among the confederated states, even during the pressure of the Revolution. If, in this state of things, it was deemed indispensable to create a special judicial power for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might, when this power was plenary, its judgment conclusive on the right, while the other powers delegated to congress were mere shadowy forms, one conclusion at least is inevitable: That the constitution, which emanated directly from the people in conventions in the several states, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation adopted by the mere legislative power of the states had given to a special tribunal appointed by congress, whose members were the mere creatures and representatives of state legislatures, appointed by them without any action by the people of the state. This court exists by a direct grant from the people of their judicial power; it is exercised by their authority, as their agent selected by themselves, for the purposes specified; the people of the states, as they respectively became parties to the constitution, gave to the judicial power of the United States jurisdiction over themselves, controversies between states, between citizens of the same or different states claiming lands under their conflicting grants within disputed territory. No fact was more prominent in our history, none could have been more strongly impressed on the members of the general and state conventions, than that contests for the vacant lands of the crown long threatened the dissolution of the confederation which existed practically and by common consent from 1774 to 1781, when, after five years of discussion, it was ratified by the legislatures of all the states. This court has attested the fact. 6 Cranch, 142; 5 Wheat., 376. Similar danger was imminent from controversies about boundaries between the states till provision was made for their decision, with a proviso "that no state should be deprived of territory for the benefit of the

United States." 1 Laws U. S., 17. These two provisions, taken in connection, put an end to any fears of convulsion by the contests of states about boundary and jurisdiction, when any state could, by appeal, bring the powers of congress and a judicial tribunal into activity, and the United States could not take any vacant land within the boundary of a state. Hence resulted the principles laid down by this court in *Harcourt and Gaillard*, 12 Wheat., 526, that the boundaries of the United States were the external boundaries of the several states, and that the United States did not acquire any territory by the treaty of peace in 1783 (8 Stats. at Large, 80).

Yet, though this express provision was made to settle controverted boundaries by judicial power, congress had no supervision over compacts and agreements between states as to boundary, save on grants made before the compact; the states did and could so settle them without the consent of congress, to whom, as no express power on or over the subject of such compacts was delegated, their dissent could not invalidate them. Such was the law of the confederacy during a common war, when external danger could not suppress the danger of dissolution from internal dissensions; when, owing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act directly on the people of the states, on the rights of the states (except those in controversy between them), or the subject-matters on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary. The constitution which superseded the articles of confederation erected a new government, organized it into distinct departments, assigning to each its appropriate powers, and to congress the power to pass laws for carrying into execution the powers granted to each, so that the laws of the Union could be enforced by its own authority, upon all persons and subject-matters over which jurisdiction was granted to any department or officer of the government of the United States. It was to operate in a time of peace with foreign powers, when foreign pressure was not in itself some bond of union between the states, and danger from domestic sources might be imminent; to extend the legislative, executive and judicial power alike over persons and states, on the enumerated subjects by their own grants. The states submitted to its exercise, waived their sovereignty, and agreed to come to this court to settle their controversies with each other, excepting none in terms. So they had agreed by the confederation; not only not excepting, but in express terms including, all disputes and differences whatever.

In the front of the constitution is a declaration by the sovereign power from which it emanated, that it was ordained "in order to form a more perfect union, establish justice, insure domestic tranquillity," etc. Whether it was best calculated to effect these objects by making the judicial power utterly incompetent to exercise a jurisdiction expressly delegated to the old congress and its constituted court, over states and their boundaries, in the plenitude of absolute power, yet granted only by the legislative power of the several states; or whether the powers granted to this court by the people of all the states ought, by mere construction and implication, to be held inefficient for the objects of its creation, and not capable of "establishing justice" between two or more states, are the direct questions before us for consideration. Without going further into any general consideration on the subject, there is one which cannot be overlooked, and is imperious in its results. Under the confederation, the states were free to settle their controversies of any kind whatever by compact

or agreement; under the constitution they can enter into none without the consent of congress, in the exercise of its political power; thus making an amicable adjustment a political matter for the concurring determination of the states and congress, and its construction a matter of judicial cognizance by any court to which the appropriate resort may be had by the judiciary act.

This has uniformly been done in the courts of the states and Union; no one has ever deemed such an exercise of power to be extrajudicial, or a case which called for it to be *coram non judice*. When, therefore, the court judicially inspects the articles of confederation, the preamble to the constitution, together with the surrender by the states of all power to settle their contested boundaries, with the express grant of original jurisdiction to this court, we feel not only authorized, but bound to declare that it is capable of applying its judicial power, to this extent at least: 1. To act as the tribunal substituted by the constitution in place of that which existed at the time of its adoption, on the same controversies and to a like effect. 2. As the substitute of the contending states, by their own grant, made in their most sovereign capacity, conferring that pre-existing power, in relation to their own boundaries, which they had not surrendered to the legislative department; thus separating the exercise of political from judicial power, and defining each.

There is but one power in this Union paramount to that by which, in our opinion, this jurisdiction has been granted, and must be brought into action if it can. That power has been exerted in the eleventh amendment; but while it took from this court all jurisdiction, past, present and future (3 Dall., 382), of all controversies between states and individuals, it left its exercise over those between states as free as it had been before. This, too, with the full view of the decisions of this court, and the act of 1789, giving it exclusive jurisdiction of all controversies of a civil nature, where a state is a party; and there can be no subject on which the judicial power can act with a more direct and certain tendency, to effectuate the great objects of its institution, than the one before us. If we cannot "establish justice" between these litigant states as the tribunal to which they have both submitted the adjudication of their respective controversies, it will be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate orbit, as the instrument appointed by the constitution so to execute its agency as to make this bond of union between the states more perfect, and thereby enforce the domestic tranquillity of each and all.

Being thus fully convinced that we have an undoubted jurisdiction of this cause, as far as we have proceeded in examining whether, by a true and just construction of the constitution and laws, it is included or excluded, in the grant of judicial power, for any purpose, we now proceed to inquire how that jurisdiction shall be exerted; whether to retain or dismiss the complainant's bill. This depends on our jurisdiction over any of the matters on which the plaintiff asks our interposition. If there is any one subject on which we can act, the bill must be retained; so that the true inquiry is not as to the extent, but the existence of any jurisdiction. 1 Ves. Sen., 203, 205; 2 id., 356.

The bill prays, 1. For the ascertaining and establishing the boundary line between the states, by the order of this court. 2. That the right of jurisdiction and sovereignty of the plaintiff to the disputed territory may be restored to her, and she be quieted in the enjoyment thereof and her title thereto; and for further relief. If we can decree any relief specially called for, or any

other relief, consistently with the specific prayer, we must proceed in the cause. 10 Pet., 228; 8 Pet., 536.

The first prayer is to ascertain and establish a boundary. Having expressed our opinion that the subject of boundary is within our jurisdiction, we must exercise it to some extent, and on some matter connected with or dependent upon it, and as the bill is on the equity side of the court, it must be done according to the principles and usages of a court of equity.

In the bill are set forth various charters from the crown, from 1621 to 1691, and sundry proceedings by the grantees and the crown in relation thereto; also agreements between the parties as colonies and states, for adjusting their boundaries, and the proceedings of their respective legislatures and commissioners in relation thereto, from 1709 to 1818. The plaintiff relies on the charters of the two colonies as the rule by which to settle the boundary; on the continued assertion of her rights, as well by the charter as her previous purchase from the Indians; denying altogether the validity of the agreements and subsequent proceedings; averring that they were made under misrepresentation and mistake as to material facts. On the other hand the defendant pleads the agreements as a bar; that they are binding and have been ratified by the plaintiff; so that the plaintiff rests his case on a question of original boundary, unaffected by any agreement; the defendant rests on the agreements without regard to the original charter boundaries. One asking us to annul, the other to enforce, the agreements; one averring continual claim, the other setting up the quiet, unmolested possession for more than a century, in strict conformity to and by the line in the agreements. Our first inquiry, then, must be as to our power to settle the boundary; in other words, to decide what portion of the territory in dispute belongs to the one state or the other, according to the line which is their common boundary. There is not in fact, nor by any law can be, any territory which does not belong to one or the other state; so that the only question is, to which the territory belongs. This must depend on the right by which each state claims the territory in question. Both claim under grants of contiguous territory by the king, in whom was the absolute propriety and full dominion in and over it. 9 Pet., 745 to 748; 8 Wheat., 595. The line drawn or pointed out in his grant is therefore that which is designated in the two charters as the common boundary of both. 5 Wheat., 375.

The locality of that line is matter of fact, and when ascertained separates the territory of one from the other; for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary it is a part of the territory of a state; title, jurisdiction and sovereignty are inseparable incidents, and remain so till the state makes some cession. The plain language of this court in *The United States v. Bevens*, 3 Wheat., 386 *et seq.*, saves the necessity of any reasoning on this subject. The question is put by the court, "What, then, is the extent of jurisdiction which a state possesses?" "We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory, co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to ("by") the United States. *Id.*, 387." "A cession of territory is essentially a cession of jurisdiction. *Id.*, 388. Still, the general jurisdiction over the place, subject to this grant of power (to the United States), adheres to the territory as a portion of sovereignty not yet given away." *Id.*, 389.

This principle is embodied in the sixteenth clause of the eighth section, first

article of the constitution, relative to this district; forts, arsenals, dock-yards, magazines; and uniformly applied to all acquisitions of territory by the United States, in virtue of cessions by particular states or foreign nations. 5 Wheat., 324; 5 Wheat., 375; 3 Wheat., 388, 89; 2 Pet., 300. etc. Title, jurisdiction, sovereignty, are therefore dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it; so that, great as questions of jurisdiction and sovereignty may be, they depend in this case on two simple facts. 1. Where is the southernmost point of Charles river? 2. Where is the point, three English miles in a south line, drawn from it? When these points are ascertained, which by the terms are those called for in both charters, then an east and west line from the second point is necessarily the boundary between the two states, if the charters govern it.

If this court can, in a case of original jurisdiction, where both parties appear, and the plaintiff rests his case on these facts, proceed to ascertain them, there must be an end of this cause when they are ascertained, if the issue between them is upon original right by the charter boundaries. We think it does not require reason or precedent to show that we may ascertain facts with or without a jury, at our discretion, as the circuit courts and all others do, in the ordinary course of equity; our power to examine the evidence in the cause, and thereby ascertain a fact, cannot depend on its effects, however important in their consequences. Whether the sovereignty of the United States, of a state, or the property of an individual, depends on the locality of a tree, a stone, or water-course; whether the right depends on a charter, treaty, cession, compact, or a common deed,—the right is to territory great or small in extent, and power over it, either of government or private property; the title of a state is sovereignty, full and absolute dominion (2 Pet., 300, 301); the title of an individual, such as the state makes it by its grant and law.

No court acts differently in deciding on boundary between states than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province or a state is and shall be. When no other matter affects a boundary, a decree settles it as having been by original right at the place decreed; in the same manner as has been stated where it is settled by treaty or compact; all dependent rights are settled when boundary is. 1 Ves., 448–450. If, therefore, there was an issue in this case on the locality of the point three miles south of the southernmost point of Charles river, we should be competent to decide it, and decree where the boundary between the states was in 1629, and 1663, at the dates of their respective charters.

On these principles it becomes unnecessary to decide on the remaining prayers of the bill; if we grant the first, and settle boundary, the others follow; and if the plaintiff obtains relief as to that, he wants no other. The established forms of such decrees extend to everything in manner or way necessary to the final establishment of the boundary as the true line of right and power between the parties. This, however, is not a case where there is an issue on original boundary; the defendant does not rest on that fact, but puts

in a plea setting up an agreement or compact of boundary between the parties while colonies, and the actual establishment of a line agreed on, run, marked and ratified by both colonies, long possession, and a right by prescription to all the territory north of such line. This presents a case of an agreement, on one side, alleged to be conclusive upon every matter complained of in the bill; on the other, to be invalid for the reasons alleged. If this matter of the plea is sufficient in law, and true in fact, it ends the cause; if not so in both respects, then the parties are thrown back on their original rights, according to their respective claims to the territory in question by charters or purchase from the Indians. If, then, we can act at all on the case, we must, on this state of the pleadings, decide on the legal sufficiency of the plea, if true, as on a demurrer to it; next, on the truth of its averments; and then decide whether it bars the complaint of the plaintiff and all relief; if it does not, then we must ascertain the fact on which the whole controversy turns. In the first aspect of the case it presents a question of the most common and undoubted jurisdiction of a court of equity; an agreement which the defendant sets up as conclusive to bar all relief, and the plaintiff asks to be declared void, on grounds of the most clear and appropriate cognizance in equity, and not cognizable in a court of law. A false representation made by one party, confided in by the other, as to a fact on which the whole cause depends, the execution of the agreement, and all proceedings under it, founded on a mistaken belief of the truth of the fact represented. We must, therefore, do something in the cause, unless the defendants have, in their objections, made out this to be an exception to the usual course of equity in its action on questions of boundary.

§ 751. *A controversy between two states as to the locality of their common boundary line is, since the adoption of the constitution, a judicial, not a political, question. English and American authorities reviewed.*

It is said that this is a political, not civil, controversy between the parties, and so not within the constitution or thirteenth section of the judiciary act. As it is viewed by the court, it is on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles river, which is the only question which can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain, by Woodward and Saffrey, in 1642, is the true point from which to run an east and west line as the compact boundary between the states. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which presents a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals. This controversy, then, cannot be a political one, unless it becomes so by the effect of the settlement of the boundary, by a decree on the fact or the agreement, or because the contest is between states as to political rights and power, unconnected with the original or compact boundary.

We will not impute to the men who conducted the colonies at home, and in congress, in the three declarations of their rights previous to the consummation of the Revolution, from 1774 to 1776, and its final act, by a declaration of the rights of the states, then announced to the world, an ignorance of the effects of territorial boundary between them, in both capacities. Every declaration of the old congress would be falsified, if the line of territory is held not to have been, from the first, the line of property and power. The congress which in 1777 framed and recommended the articles of confederation for adoption,

by the legislative power of the several states, were acting in a spirit of fatuity, if they thought that a final and conclusive judgment on state boundaries was not equally decisive as to the exercise of political power by a state; making it rightful within but void beyond the adjudged line.

The members of the general and state conventions were alike fatuitous, if they did not comprehend and know the effect of the states submitting controversies between themselves to judicial power; so were the members of the first congress of the first constitution, if they could see and not know, read and not understand, its plain provisions, when many of them assisted in its frame.

The founders of our government could not but know, what has ever been and is familiar to every statesman and jurist, that all controversies between nations are in this sense political, and not judicial, as none but the sovereign can settle them. In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted that they could of right do what other independent states could do; "declare war, make peace, contract alliances;" of consequence, to settle their controversies with a foreign power, or among themselves; which no state and no power could do for them. They did contract an alliance with France, in 1778 (8 Stats. at Large, 6), and with each other in 1781; the object of both was to defend and secure their asserted rights as states; but they surrendered to congress, and its appointed court, the right and power of settling their mutual controversies, thus making them judicial questions, whether they arose on "boundary, jurisdiction, or any other cause whatever." There is neither the authority of law or reason for the position that boundary between nations or states is in its nature any more a political question than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but under the old and new confederacy they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states which states alone could do before. We are thus pointed to the true boundary line between political and judicial power and questions. A sovereign decides by his own will, which is the supreme law within his own boundary (6 Pet., 714; 9 Pet., 748); a court or judge decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves., 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.

It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial; they decided on questions of war and peace, the law of nations, treaties and the municipal laws of the capturing nation, by which alone they are constituted; *a fortiori*, if such courts were constituted by a solemn treaty between the state under whose authority the capture was made, and the state whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their sub-

jects, and hold their final decrees conclusive on rights of property. 6 Cranch, 284-5.

These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation (3 Ves., 429); the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of *Barclay v. Russell*, 3 Ves., 435, as they have long been settled and established. Their correctness will be tested by a reference to the question of original boundary as it ever has been, and yet is by the constitution of England, which was ours before the Revolution, while colonies (8 Wheat., 588); as it was here from 1771 to 1781, thence to 1788, and since by the constitution as expounded by this court.

If the question concerning the boundaries of contiguous pieces of land, manors, lordships or counties palatine, arises within the realm, it was cognizable in the high court of chancery, in an appropriate case; a mere question of title to any defined part was cognizable only by ejectment or real action in a court of law, which were in either case judicial questions. 1 Ves. Sen., 446-7. If between counts palatine, boundary involved not only the right of soil, but the highest franchise known to the law of England, *jura regalia* to the same extent as the king in right of the crown and royal jurisdiction. Palatine jurisdiction was a qualified sovereignty, till abridged by the 24 H. 8, ch. 24. Seld. Tit. Hon., 380, 382, 638, 838; 1 Black. Commentaries, 108-17; 7 Co., 19; Cro. El., 240; 4 D. C. D., 450, etc. The count appointed the judges of courts of law and equity; the king's writs did not run into his county; writs were in his name, and indictments against his peace. Co. Inst., 204-18. Yet his jurisdiction, his royalties, and *jura regalia*, etc., existed or disappeared, according as a chancellor should decree as to boundary. *Penn v. Baltimore*, 1 Ves. Sen., 448-9, etc. The king had no jurisdiction over boundary within the realm, without he had it in all his dominions, as the absolute owner of the territory, from whom all title and power must flow (1 Bl. Com., 241; Co. Litt., 1; Hob., 322; 7 D. C. D., 76; Cowp., 205-11; 7 Co., 17, b), as the supreme legislator; save a limited power in parliament. He could make and unmake boundaries in any part of his dominions, except in proprietary provinces. He exercised this power by treaty, as in 1763, by limiting the colonies to the Mississippi, whose charters extended to the South Sea; by proclamation, which was a supreme law, as in Florida and Georgia (12 Wheat., 524; 1 Laws U. S., 443-51); by order in council, as between Massachusetts and New Hampshire, cited in the argument. But in all cases it was by his political power, which was competent to dismember royal, though it was not exercised on the chartered or proprietary, provinces. *M'Intosh v. Johnson*, 8 Wheat., 580. In council, the king had no original judicial power. 1 Ves. Sen., 447. He decided on appeals from the colonial courts, settled boundaries, in virtue of his prerogative, where there was no agreement; but if there is a disputed agreement, the king cannot decree on it, and, therefore, the council remit it to be determined in another

place, on the foot of the contract. 1 Ves. Sen., 447. In virtue of his prerogative, where there was no agreement (1 Ves. Sen., 205), the king acts, not as a judge, but as a sovereign, acting by the advice of his council, the members whereof do not and cannot sit as judges. By the statute, 20 E. III., ch. 1, it is declared that "the king hath delegated his whole judicial power to the judges, all matters of judicature according to the laws" (1 Ruff., 246; 4 Co. Inst., 70, 74); he had, therefore, none to exercise; and judges, though members of council, did not sit in judicature, but merely as his advisers.

The courts had no jurisdiction over the colonies, persons, or property therein, except in two cases; colonies and provinces, being corporations under letters-patent (3 Ves., 435), were amenable to the king in the king's bench, by *quo warranto*, which is a prerogative writ; and a *scire facias*, in chancery, to repeal the letters-patent, which is a part of the statutory jurisdiction of that court in such cases, by the court in chancery, also in virtue of the royal prerogative, by which the charter was made. But chancery could not act on boundaries in the royal or chartered colonies; it could act on lords proprietors of provinces, when they were in the realm, where they were subjects, though in their provinces they were sovereign, dependent only on the crown and the general supremacy of parliament. Acts of parliament did not bind them, unless extended to them expressly, or by necessary consequence. 2 Ves. Sen., 351. They had all the powers of counts palatine, the absolute propriety of soil, and the powers of legislation; the only restraint upon them was by the powers reserved to the king by his letters-patent, and allegiance to the crown in matters of prerogative not granted. The power of parliament was, on the American principle of the Revolution, confined to the regulation of "external commerce," though by the English principle it extended to all cases whatever. Yet sovereign as they were as to all things except those relating to the powers of the king and parliament, chancery could and did act on agreements between them as to their boundaries, in the case of *Penn v. Baltimore*, though it could not have done so had they stood at arms' length; in which case the king in council could alone have decided the original boundary on an appeal. 1 Ves. Sen., 446. Chancery also could and did decide on the title to the Isle of Man, which was a feudal kingdom; on a bill for discovery of title, relief as to rectories and tithes, which was a mere franchise, a plea to jurisdiction was overruled. *Derby v. Athol*, 1 Ves. Sen., 202; *S. P., Bishop of Sodor & Man v. E. Derby*, 2 Ves. Sen., 337, 356.

In each of these cases, objections to the jurisdiction were made similar to those made in this, but were overruled; and neither the authority or principles of either have been questioned; on the contrary, they have been recognized and adopted by all courts which follow the course of the law of England; yet each involved the same question as the present. In the first the decree as to boundary settled by consequence the collateral and dependent questions of title, jurisdiction and sovereignty of and over the disputed territory; in the last two, on a suit for rectories and tithes, the title to a feudal kingdom was but a dependent matter, and was settled by deciding that the bishop had a right to the tithes he claimed. The same principle was settled in the case of *The Nabob of the Carnatic v. The East India Company*, 1 Ves. Jr., 371, though it is commonly referred to in favor of a contrary position.

On the original pleadings the case was on a bill for an account founded on two agreements between the parties in 1785 and 1787. The defendants pleaded their rights and privileges under their charter, with power to make peace and

war within its limits; that the plaintiff was a sovereign prince; that the agreements stated in the bill were made with him in their respective capacities, one as an absolute, the other as a qualified, sovereign; and that the matters therein contained related to peace and war, and the security and defense of their respective territorial possessions.

The plea was considered and overruled by the chancellor, thus exercising jurisdiction to that extent. 1 Ves. Jr., 371, 387. An answer was then put in containing the same matter as the plea, adding that the agreements between the parties were treaties of a federal character, both being sovereigns, and that the agreement of 1787 was a final treaty; and, therefore, the subject-matters thereof were cognizable by the law of nations, not by a municipal court. The bill was dismissed on this ground: "It is a case of mutual treaty between persons acting, in that instance, as states independent of each other; and the circumstance that the East India Company are mere subjects with relation to this country has nothing to do with that. That treaty was entered into with them as a neighboring independent state, and is the same as if it was a treaty between two sovereigns, and consequently is not a subject of municipal private jurisdiction." It thus is manifest that, if the answer had been to the merits, there must have been a decree; the dismissal resulted from the new matter added, as is evident from the opinion of the chancellor on the plea, and of Lord Commissioner Eyre on the answer, and his closing remarks, in which he declares "that the case was considered wholly independent of the judgment on the plea, and was decided on the answer, which introduced matters showing that it was not mercantile in its nature, but political, and therefore the decision stood wholly clear of the judgment on the plea." 2 Ves. Jr., 56, 60.

That a foreign sovereign may sue in an English court of law or equity was settled in cases brought by the king of Spain. Hob., 113. That a foreign government may sue in chancery, by such agents as it authorizes to represent it, on whom a cross-bill can be served, with such process as will compel them to do justice to the defendant, was decided in *The Columbian Government v. Rothschild*, 1 Sim., 104. These cases were recognized in *The King of Spain v. Machado*, by the house of lords, who held that a king had the same right to sue as any other person, but that when he did sue in chancery it was as any other suitor who sought or submitted to its jurisdiction; that it could decide on the construction and validity of the treaties between France and the allied sovereigns of Europe in 1814, and on the validity of a private and separate treaty between France and Spain.

The case involved both questions; both were fully considered by the lords in affirming the decree of the chancellor, overruling the demurrer (4 Russell, 560); which assigned for cause that the plaintiff had not made out a case for any relief in a court of equity for the reasons assigned in the argument; that a foreign sovereign could not sue in virtue of his prerogative rights; that an English court would not enforce these rights accruing out of a treaty with France, which was inconsistent with the existing relations between each of those countries (France and Spain) and the king of England. 2 Bligh. P. C., new series, 31, 44, 46, 50, 60. The court of king's bench also will consider the effect of the declaration of independence and treaty of peace, in an action on a bond. *Ogden v. Folliot*, 3 D. & E., 730.

From this view of the law of England the results are clear that the settlement of boundaries by the king in council is by his prerogative, which is political power acting on a political question between dependent corporations or

proprieties in his dominions without the realm. When it is done in chancery it is by its judicial power in "judicature according to the law," and necessarily a judicial question, whether it relates to the boundary of provinces, according to an agreement between the owners, as *Penn v. Baltimore*; the title to a feudal kingdom, in a suit appropriate to equity, where the feudal king appears and pleads, as in the case of the Isle of Man; or on an agreement between a foreign sovereign and the East India Company in their mere corporate capacity. But when the company assume the character of a sovereign, assert the agreement to be a "federal treaty" between them and the plaintiff as neighboring sovereigns, each independent, and the subject-matter to be peace and war, political in its nature, on which no municipal court can act by the law of nations, chancery has no jurisdiction but to dismiss the bill. Not because it is founded on a treaty, but because the defendant refused to submit it to judicial power; for, had the company not made the objection by their answer, the court must have proceeded as in *The King of Spain v. Machado*, and decreed on the validity as well as the construction of the treaties. The court, in one case, could not force a sovereign defendant to submit the merits of the case to their cognizance; but in the other, when he was plaintiff and a subject was a defendant, who appeared and pleaded, the whole subject-matter of the pleadings was decided by judicial power as a judicial question, and such has been and is the settled course of equity in England.

In the colonies there was no judicial tribunal which could settle boundaries between them, for the court of one could not adjudicate on the rights of another, unless as a plaintiff. The only power to do it remained in the king, where there was no agreement, and in chancery, where there was one, and the parties appeared, so that the question was partly political and partly judicial, and so remained till the declaration of independence. Then the states, being independent, reserved to themselves the power of settling their own boundaries, which was necessarily a purely political matter, and so continued till 1781. Then the states delegated the whole power over controverted boundaries to congress, to appoint and its courts to decide, as judges, and give a final sentence and judgment upon it as a judicial question, settled by a specially appointed judicial power as the substitute of the king in council, and the court of chancery in a proper case; before the one as a political, and the other as a judicial, question.

Then came the constitution, which divided the power between the political and judicial departments, after incapacitating the states from settling their controversies upon any subject, by treaty, compact or agreement, and completely reversed the long-established course of the laws of England. Compacts and agreements were referred to the political, controversies to the judicial, power. This presents this part of the case in a very simple and plain aspect. All the states have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788; that we should do that which neither states nor congress could do — settle the controversies between them. We should forget our high duty to declare to litigant states that we had jurisdiction over judicial, but not the power to hear and determine political, controversies; that boundary was of a political nature, and not a civil one; and dismiss the plaintiff's bill from our records without even giving it judicial consideration. We should equally forget the dictate of reason, the known rule drawn by fact and law, that from the nature of a controversy be-

tween kings or states, it cannot be judicial; that where they reserve to themselves the final decision, it is of necessity by their inherent political power, not that which has been delegated to the judges as matters of judicature according to the law. These rules and principles have been adopted by this court from a very early period.

In 1799 it was laid down that though a state could not sue at law for an incorporated right, as that of sovereignty and jurisdiction, there was no reason why a remedy could not be had in equity. That one state may file a bill against another, to be quieted as to the boundaries of disputed territory, and this court might appoint commissioners to ascertain and report them, since it is monstrous to talk of existing rights without correspondent remedies. 3 Dal., 413. In *New Jersey v. Wilson*, the only question in the case was whether Wilson held certain lands exempt from taxation. 7 Cranch, 164. In *Cohens v. Virginia*, the court held that the judicial power of the United States must be capable of deciding any judicial question growing out of the constitution and laws. That in one class of cases "the character of the parties is everything, the nature of the case nothing; in the other, "the nature of the case is everything, the character of the parties nothing." That the clause relating to cases in law or equity arising under the constitution, laws and treaties, makes no exception in terms, or regards "the condition of the party." If there be any exception it is to be implied against the express words of the article. In the second class "the jurisdiction depends entirely on the character of the parties" comprehending "controversies between two or more states." "If these be the parties it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union." 6 Wheat., 378, 384, 392-3.

In the following cases it will appear that the course of the court, on the subject of boundary, has been in accordance with all the foregoing rules; let the question arise as it may in a case in equity or a case in law, of a civil or criminal nature, and whether it affects the rights of individuals, of states, or the United States, and depends on charters, laws, treaties, compacts or cessions, which relate to boundary. In *Robinson v. Campbell* the suit involved the construction of the compact of boundary between Virginia and North Carolina, made in 1802, and turned on the question whether the land in controversy was always within the original limits of Tennessee, which the court decided. 3 Wheat., 213, 218, 224. The *United States v. Bevans* was an indictment for murder; the questions certified for the opinion of this court were: 1st, whether the place at which the offense was committed was within the jurisdiction of Massachusetts; and 2d, whether it was committed within the jurisdiction of the circuit court of that district. It was considered and decided as a question of boundary (3 Wheat., 339, 386), as before stated. In *Burton v. Williams*, the case involved a collision of interest between North Carolina, Tennessee, and the United States, under the cessions by the former to the two latter, in which this court reviewed all the acts of congress and of the two states on the subject, and the motives of the parties, to ascertain whether the *casus fœderis* had ever arisen. The case also involved the construction of the compact between Tennessee and the United States, made in 1806. The court use this language in relation to it; "The members of the American family possess ample means of defense under the constitution, which we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is

taken away." It is difficult to imagine what other means of defense existed in such a case, unless those which the court adopted, by construing the acts recited, as the contracts of independent states, by those rules which regulate contracts relating to territory and boundary. 3 Wheat., 529, 533, 538. In *De La Croix v. Chamberlain*, it was held that "a question of disputed boundary between two sovereigns, independent nations, is indeed more properly a subject for diplomatic discussion and of treaty than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. 12 Wheat., 600. Accordingly, in *Harcourt v. Gaillard*, which arose on a British grant, made in 1777, the court decided the case by reference to the treaty of 1763, the acts of the king before the Revolution, the effect of the declaration of independence, and treaty of peace in 1783, in order to ascertain the original boundary between Florida and Georgia, on which the whole case turned. 12 Wheat., 524. In *Henderson v. Poindexter*, the same point arose, and the same course was taken; the treaty of boundary with Spain, in 1795, was also considered by the court, as well as the cession by Georgia to the United States in 1802, and the various acts of congress on the subject. 12 Wheat., 530, 534, etc. In *Patterson v. Jenks*, the title depended on the boundary between Georgia and the Cherokees; and the only question was as to the territorial limits of the state, according to the treaties with them and that state, and the court defined and decided accordingly. 2 Pet., 225-7, etc. So they had previously done in various cases arising on the boundary between North Carolina and the Cherokees. 1 Wheat., 155; 2 Wheat., 25; 9 Wheat., 673; 11 Wheat., 380. In *Foster and Elam v. Neilson*, two questions arose: 1. On the boundary of the treaty of 1803 (8 Stats. at Large, 200), ceding Louisiana to the United States, as it was before the cession of the Floridas by Spain, by the treaty of 1819 (8 Stats. at Large, 252). 2. The construction of the eighth article of that treaty. Both claimed the territory lying north of a line drawn east from the Iberville, and extending from the Mississippi to the Perdido. The title to the land claimed by the parties depended on the right of Spain to grant lands within the disputed territory, at the date of the Spanish grant to the plaintiff, in 1804. He claimed under it, as being then within the territory of Spain; and confirmed absolutely by the treaty of cession. The defendant rested on his possession. On the first question, the court held that, so long as the United States contested the boundary, it was to be settled by the two governments, and not by the court; but if the boundary had been settled between France, while she held Louisiana, and Spain, while she held Florida, or the United States and Spain had agreed on the boundary after 1803, then the court could decide it as a matter bearing directly on the title of the plaintiff. On the second question, they held that as the government had up to that time construed the eighth article of the treaty of 1819 to be a mere stipulation for the future confirmation of previous grants by Spain, to be made by some legislative act, and not a present confirmation, absolute and final by the mere force of the treaty itself, as a supreme law of the land, the court was bound not to give a different construction. On that construction, the question was, by whom the confirmation should be made; the court held the words of the treaty to be the language of contract, to be executed by an act of the legislature, of course by political power; to be exercised by the congress at its discretion; on which the court could not act. But the court distinctly

recognized the distinction between an executory treaty, as a mere contract between nations, to be carried into execution by the sovereign power of the respective parties, and an executed treaty, effecting of itself the object to be accomplished, and defined the line between them thus: "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract; when either of the parties stipulate to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule for the court." Adopting the construction given by congress, and the boundary being disputed in 1804, when the grant was made, the court considered both to be political questions, and held them not to be cognizable by judicial power. 2 Pet., 253, 299, 306, 309, 314, 315. All the principles laid down in this case were fully considered and affirmed in *The United States v. Arredondo*, which arose under an act of congress submitting to this court the final decision of controversies between the United States and all persons claiming lands in Florida under grants, etc., by Spain, and prescribing the rules for its decision, among which was the "stipulations of any treaty," etc. Thus acting under the authority delegated by congress, the court held that the construction of the eighth article of the treaty of 1819, by its submission to judicial power, became a judicial question, and on the fullest consideration held that it operated as a perfect, present and absolute confirmation of all the grants which come within its provision. That no act of the political department remained to be done; that it was an executed treaty, the law of the land and a rule for the court. 6 Pet., 710, 735, 741, 742, 743. In *The United States v. Percheman*, the court, on considering the necessary effect of this construction, repudiated that which had been given in *Foster and Elam v. Neilson*, 7 Pet., 89. In the numerous cases which have arisen since, the treaty has been taken to be an executed one, a rule of title and property, and all questions arising under it to be judicial; and congress has confirmed the action of the court whenever necessary. In *New Jersey v. New York*, the court were unanimous in considering the disputed boundary between these states to be within their original jurisdiction, and reaffirming the jurisdiction of the circuit courts in cases between parties claiming lands under grants from different states; the only difference of opinion was on one point, suggested by one of the judges, whether, as New York had not appeared, the court could award compulsory process or proceed *ex parte*, a point which does not arise in this cause, and need not to be considered in its present stage, as Massachusetts has appeared and pleaded to the merits of the bill.

If judicial authority is competent to settle what is the line between judicial and political power and questions, it appears from this view of the law, as administered in England and the courts of the United States, to have been done without any one decision to the contrary, from the time of Edward the Third. The statute referred to operated, like our constitution, to make all questions judicial which were submitted to judicial power by the parliament of England, the people or legislature of these states, or congress; and when this has been done by the constitution, in reference to disputed boundaries, it will be a dead letter if we do not exercise it now, as this court has done in the cases referred to.

§ 752. *The declaration of independence did not render the states, respectively, sovereign over all territory then in their possession.*

The course of the argument made it necessary for the court to pursue that which has been taken. Having disposed of the leading objection to jurisdiction, we will examine the others. It has been argued by the defendant's counsel, that, by the declaration of independence, Massachusetts became a sovereign state over all the territory in her possession, which she claimed by charter or agreement, in the enjoyment of which she cannot be disturbed. To this objection there are two obvious answers: 1. By the third article of confederation, the states entered into a mutual league for the defense of their sovereignty, their mutual and general welfare; being thus allies in the war of the Revolution, a settled principle of the law of nations, as laid down by this court, prevented one from making any acquisition at the expense of the other. 12 Wheat., 525-6. This alliance continued in war and peace till 1788; when, 2. Massachusetts surrendered the right to judge of her own boundary, and submitted the power of deciding a controversy concerning it to this court. 6 Wheat., 378, 380, 393.

§ 753. *In questions of boundary between states it is not necessary that the inhabitants of the disputed territory be made parties to the suit.*

It is said that the people inhabiting the disputed territory ought to be made parties, as their rights are affected. It might, with the same reason, be objected that a treaty or compact settling boundary required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void, as the authority to make it was derived from the legislative power only. The same objection was overruled in *Penn v. Baltimore*, 1 Ves., 444; and in *Poole v. Fleeger*, 11 Pet., 185, this court declared that an agreement between states, consented to by congress, bound the citizens of each state. There are two principles of the law of nations which would protect them in their property: 1. That grants by a government *de facto* of parts of a disputed territory in its possession are valid against the state which had the right. 12 Wheat., 600-1. 2. That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred. 8 Wheat., 589; 12 Wheat., 535; 6 Pet., 712; 7 Pet., 867; 8 Pet., 445; 9 Pet., 133; 10 Pet., 330, 718, etc.

§ 754. *No question of process on these pleadings, the defendant having appeared and pleaded.*

It has been contended that this court cannot proceed in this cause without some process and rule of decision prescribed appropriate to the case, but no question on process can arise on these pleadings; none is now necessary, as the defendant has appeared and pleaded, which plea in itself makes the first point in the cause, without any additional proceeding; that is, whether the plea shall be allowed if sufficient in law to bar the complaint, or be overruled, as not being a bar in law, though true in fact. In this state of the case, it is that of *The Nabob v. The East India Company*, 1 Ves. Jr., 371, where the plea was overruled on that ground, whereby the defendant was put to an answer, assigning additional grounds to sustain a motion to dismiss; or if the plea is allowed, the defendant must next prove the truth of the matters set up. When that is done the court must decide according to the law of equity (1 Ves., 446, 203), whether the agreement pleaded shall settle or leave the boundary open to a settlement by our judgment, according to the law of nations, the charters from the crown under which both parties claim, as in 5 Wheat., 375; by the

law of prescription, as claimed by the defendant, on the same principles which have been rules for the action of this court in the case. 1 Ves. Sen., 453; 9 Pet., 760.

§ 755. *The powers of this court to cause its decree to be enforced in cases of disputed boundaries between states.*

It is further objected that, though the court may render, they cannot execute a decree without an act of congress in aid. In testing this objection by the common law there can be no difficulty in decreeing, as in *Penn v. Baltimore*, 1 Ves., 444, *mutatis mutandis*: That the agreement is valid and binding between the parties; appointing commissioners to ascertain and mark the line therein designated; order their proceedings to be returned to the court (3 Dall., 412, note); decree that the parties should quietly hold according to the articles; that the citizens on each side of the line should be bound thereby, so far and no further than the states could bind them by a compact, with the assent of congress (11 Pet., 209; 1 Ves., 455; 3 Ves. Sen., Supplement by Belt, 195, 197). Or if any difficulty should occur, do as declared in 1 Ves. Sen.; if the parties want anything more to be done, they must resort to another jurisdiction, which is appropriate to the cause of complaint, as the king's bench or the king in council (*vide* *United States v. Peters*, 5 Cranch, 115, 135, case of *Olmstead*); make the decree without prejudice to the United States, or any persons whom the parties could not bind. And in case any person should obstruct the execution of the agreement, the party to be at liberty, from time to time, to apply to the court. 1 Ves. Jr., 454; 3 Ves. Jr., 195, 196. Or, as the only question is one of jurisdiction, which the court will not divide, they will retain the bill and direct the parties to a forum proper to decide collateral questions. 1 Ves. Sen., 204, 205; 2 Ves. Sen., 356, 357; 1 Ves. Sen., 454; 5 Cranch, 115, 136. On the other hand, should the agreement not be held binding, the court will decree the boundary to be ascertained agreeably to the charters, according to the altered circumstances of the case; by which the boundary being established, the rights of the parties will be adjudicated, and the party in whom it is adjudged may enforce it by the process appropriate to the case, civilly or criminally, according to the laws of the state in which the act which violates the right is committed. In ordinary cases of boundary the functions of a court of equity consist in settling it by a final decree, defining and confirming it when run. Exceptions, as they arise, must be acted on according to the circumstances.

In England, right will be administered to a subject against the king as a matter of grace, but not upon compulsion; not by writ, but petition to the chancellor (1 Bl. Com., 243); for no writ or process can issue against the king, for the plain reason given in 4 Co., 55, a; 7 Com. Dig., by Day, 83; Prerog., D., 78; 3 Bl. Com., 255, "that the king cannot command himself." No execution goes out on a judgment or decree against him, on a *monstrans de droit* or petition of right, or traverse of an inquisition which had been taken in his favor, for this reason: that, as the law gives him a prerogative for the benefit of his subjects (1 Bl. Com., 255), he is presumed never to do a wrong or refuse a right to a subject; he is presumed to have done the thing decreed by decreeing in his courts that it shall be done; such decree is executed by the law as soon as it is rendered; and though process is made out to make the record complete, it is never taken from the office. Co. Ent., 196; 9 Co., 98, a; 7 D. C. D., 83. The party in whose favor a decree is made for removing the lands of the king from the possession of a subject, or declaring a seizure unlawful, and

awarding a writ *de libertate*, is, *eo instanti*, deemed to be in actual possession thereof; so that a feoffment, with livery of seizin, made before it is actually taken, is as valid as if made afterwards. Cro. E., 523; S. P., 463.

The same principle was adopted by the eminent jurists of the Revolution, in the ninth article of the confederation, declaring that the sentence of the court in the cases provided for should be final and conclusive, and, with the other proceedings in the case, be transmitted to congress, and lodged among their acts, for the security of the parties concerned, nothing further being deemed necessary. The adoption of this principle was indeed a necessary effect of the Revolution, which devolved on each state the prerogative of the king as he had held it in the colonies (4 Wheat., 651; 8 Wheat., 584, 588), and now holds it within the realm of England, subject to the presumptions attached to it by the common law, which gave, and by which it must be exercised. This court cannot presume that any state which holds prerogative rights for the good of its citizens, and by the constitution has agreed that those of any other state shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong, or deny right to a sister state or its citizens, or refuse to submit to those decrees of this court, rendered pursuant to its own delegated authority; when in a monarchy, its fundamental law declares that such decree executes itself. When, too, the highest courts of a kingdom have most solemnly declared that when the king is a trustee, a court of chancery will enforce the execution of a trust by a royal trustee (1 Ves. Sen., 453); and that when a foreign king is a plaintiff, in a court of equity, it can do complete justice; impose any terms it thinks proper; has him in its power, and completely under its control and jurisdiction (2 Bligh. P. C., 57), we ought not to doubt as to the course of a state of this Union, as a contrary one would endanger its peace, if not its existence. In the case of *Olmstead*, this court expressed its opinion that if state legislatures may annul the judgments of the courts of the United States, and the rights thereby acquired, the constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by its own tribunal. So fatal a result must be deprecated by all, and the people of every state must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves. 5 Pet., 115, 135. The motion of the defendant is therefore overruled.

Dissenting opinion by TANEY, C. J.

I dissent from the opinion of the court upon the motion to dismiss the bill. It has, I find, been the uniform practice in this court for the justices who differed from the court on constitutional questions to express their dissent. In conformity to this usage I proceed to state briefly the principle on which I differ, but do not, in this stage of the proceedings, think it necessary to enter fully into the reasoning upon which my opinion is founded. The final hearing of the case, when all the facts are before the court, would be a more fit occasion for examining various points stated in the opinion of the court in which I do not concur.

I do not doubt the power of this court to hear and determine a controversy between states or between individuals, in relation to the boundaries of the states, where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of judicial cognizance and decision, and which depends upon the true boundary line. But the powers given to the courts of the United States by the constitution are judicial powers, and extend

to those subjects only which are judicial in their character, and not to those which are political. And whether the suit is between states, or between individuals, the matter sued for must be one which is properly the subject of judicial cognizance and control, in order to give jurisdiction to the court to try and decide the rights of the parties to the suit.

The object of the bill filed by Rhode Island, as stated in the prayer, is as follows: That the northern boundary line between your complainants and the state of Massachusetts may, by the order and decree of this honorable court, be ascertained and established, and that the rights of jurisdiction and sovereignty of your complainants to the whole tract of land, with the appurtenances mentioned, described and granted, in and by the said charter or letters-patent to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north, an east and west line drawn three miles south of the waters of said Charles river, or of any or every part thereof, may be restored and confirmed to your complainants, and your complainants may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; and the title, jurisdiction and sovereignty of the said state of Rhode Island and Providence Plantations over the same be confirmed and established by the decree of this honorable court; and that your complainants may have such other and further relief in the premises as to this honorable court shall seem meet and consistent with equity and good conscience.

It appears from this statement of the object of the bill, that Rhode Island claims no right of property in the soil of the territory in controversy. The title to the land is not in dispute between her and Massachusetts. The subject-matter which Rhode Island seeks to recover from Massachusetts in this suit is "sovereignty and jurisdiction" up to the boundary line described in her bill. And she desires to establish this line as the true boundary between the states, for the purpose of showing that she is entitled to recover from Massachusetts the sovereignty and jurisdiction which Massachusetts now holds over the territory in question. Sovereignty and jurisdiction are not matters of property, for the allegiance in the disputed territory cannot be a matter of property. Rhode Island, therefore, sues for political rights. They are the only matters in controversy, and the only things to be recovered; and if she succeeds in this suit, she will recover political rights over the territory in question, which are now withheld from her by Massachusetts.

Contests for rights of sovereignty and jurisdiction between states over any particular territory are not, in my judgment, the subjects of judicial cognizance and control, to be recovered and enforced in an ordinary suit, and are, therefore, not within the grant of judicial power contained in the constitution.

In the case of *New York v. Connecticut*, 4 Dal., 4, in the note, Chief Justice Ellsworth says: "To have the benefit of the agreement between the states, the defendants below, who are the settlers of New York, must apply to a court of equity, as well as the state herself; but in no case can a specific performance be decreed, unless there is a substantial right of soil, not a mere right of political jurisdiction to be protected and enforced." In the case of *The Cherokee Nation v. The State of Georgia*, 5 Pet., 20, Chief Justice Marshall, in delivering the opinion of the court, said: "That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than to decide on the title. The bill requires us

to control the legislation of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question."

In the case before the court we are called on to protect and enforce the "mere political jurisdiction" of Rhode Island; and the bill of the complainant in effect asks us to "control the legislature of Massachusetts, and to restrain the exercise of its physical force" within the disputed territory. According to the opinions above referred to, these questions do not belong to the judicial department. This construction of the constitution is, in my judgment, the true one, and I therefore think the proceedings in this case ought to be dismissed for want of jurisdiction.

MR. JUSTICE BARBOUR concurred in the result of the opinion. MR. JUSTICE STORY did not sit in the case.

The motion to dismiss was overruled, and the following opinion was rendered on motions stated in the opinion:

Opinion by MR. JUSTICE THOMPSON.

A motion has been made on the part of the state of Massachusetts for leave to withdraw the plea filed on the part of that state; and also to withdraw the appearance heretofore entered for the state. A motion has also been made, on the part of Rhode Island, for leave to withdraw the general replication to the defendant's answer and plea in bar; and to amend the original bill filed in this case.

§ 756. *Mode of proceeding in case of failure of a defendant state to appear.*

The motion on the part of the state of Massachusetts to withdraw the appearance heretofore entered seems to be founded on what is supposed to have fallen from the court at the present term, in the opinion delivered upon the question of jurisdiction in this case. It is thought that opinion is open to the inference that jurisdiction is assumed in consequence of the defendant's having appeared in the cause. We did not mean to put the jurisdiction of the court upon that ground. It was only intended to say that the appearance of the state superseded the necessity of considering the question whether any and what course would have been adopted by the court, if the state had not appeared. We certainly did not mean to be understood that the state had concluded herself on the ground that she had voluntarily appeared; or that if she had not, we could not have assumed jurisdiction of the case. But being satisfied that we had jurisdiction of the subject-matter of the bill, so far at least as respected the question of boundary, all inquiry as to the mode and manner in which the state was to be brought into court, or what would be the course of proceeding if the state decline to appear, became entirely unnecessary. But as the question is now brought directly before us, it becomes necessary to dispose of it. We think, however, that the course of decisions in this court does not leave us at liberty to consider this an open question.

In the case of *New Jersey v. New York*, 5 Pet., 287, this question was very fully examined by the court, and the course of practice considered as settled by the former decisions of the court, both before and after the amendment of the constitution, which declared that the judicial power of the United States shall

not extend to any suit in law or equity, commenced or prosecuted against a state by citizens of another state or subjects of any foreign state. This amendment did not affect suits by a state against another state; and the mode of proceeding in such suits was not at all affected by that amendment. We do not propose to enter into this question any further than briefly to notice what the court has already decided upon the practice in this respect. These cases were reviewed in the case referred to, of *New Jersey v. New York*, and the practice found to have been established by former decisions of the court, as far as it went, was adopted. And the court went a step further, and declared what would be the course of proceeding in a stage of the cause beyond which former decisions had not found it necessary to prescribe such course.

The court, in the case of *New Jersey v. New York*, 5 Pet., 287, commence the opinion by saying: "This is a bill filed for the purpose of ascertaining and settling the boundary between the two states." And this is precisely the question presented in the bill now before us. And it is added, that congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state. The precise question was, therefore, presented, whether the existing legislation of congress was sufficient to enable the court to proceed in such a case without any special legislation for that purpose. And the court observed that at a very early period of our judicial history suits were instituted in this court against states, and the questions concerning its jurisdiction were necessarily considered.

An examination of the acts of congress in relation to process and proceedings, and the power of the court to make and establish all necessary rules for conducting business in the courts, is gone into, and considered sufficient to authorize process and proceedings against a state, and the court adopted the practice prescribed in the case of *Grayson v. The Commonwealth of Virginia*, 3 Dall., 320, that when process in common law or in equity shall issue against a state, it shall be served on the governor or chief executive magistrate, and the attorney-general of the state. The court, in that case, declined issuing a *distringas* to compel the appearance of the state, and ordered, as a general rule, that if the defendant, on service of the subpoena, shall not appear at the return day therein, the complainant shall be at liberty to proceed *ex parte*. And the course of practice has since been to proceed *ex parte* if the state does not appear. And accordingly, in several cases, on the return of the process, orders have been entered that, unless the state appear by a given day, judgment by default will be entered. And further proceedings have been had in the causes. In the case of *Chisholm v. Georgia*, 2 Dall., 419, judgment by default was entered, and a writ of inquiry awarded in February term, 1794. But the amendment of the constitution prevented its being executed. And in other cases commissions have been taken out for the examination of witnesses. By such proceedings, therefore, showing progressive stages in cases towards a final hearing, and in accordance with this course of practice, the court, in the case of *New Jersey v. New York*, adopted the course prescribed by the general order made in the case of *Grayson v. Virginia*, 3 Dall., 320, and entered a rule that the subpoena having been returned, executed sixty days before the return day thereof, and the defendant having failed to appear, it is decreed and ordered that the complainant be at liberty to proceed *ex parte*; and that unless the defendant, on being served with a copy of this decree, shall appear and answer the bill of the complainant, the court will proceed to hear the cause on the part of the complainant and decree on the matter of the said bill.

So that the practice seems to be well settled that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance, but the complainant or plaintiff will be allowed to proceed *ex parte*. If, upon this view of the case, the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given, and the state of Rhode Island may proceed *ex parte*. And if the appearance is not withdrawn, as no testimony has been taken, we shall allow the parties to withdraw or amend the pleadings under such order as the court shall hereafter make.

MR. JUSTICE BALDWIN dissented. MR. JUSTICE STORY did not sit in the case.

FOWLER v. LINDSEY.

(3 Dallas, 411-415. 1799.)

STATEMENT OF FACTS.—Suits in the nature of ejectment were brought in the circuit court for Connecticut to recover lands in that state. Defendants claim that the lands in question lay in New York. The case came before the supreme court on a rule to show cause why the actions should not be removed into that court by *certiorari*, as belonging exclusively to its jurisdiction.

§ 757. *The supreme court has no original jurisdiction on account of the interest of a state in the result of the suit, unless the state be nominally or substantially a party.*

Opinion by MR. JUSTICE WASHINGTON.

The first question that occurs from the arguments on the present occasion respects the nature of the rights that are contested in the suits depending in the circuit court. Without entering into a critical examination of the constitution and laws in relation to the jurisdiction of the supreme court, I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the supreme court, on account of the interest that a state has in the controversy, must be a case in which a state is either nominally or substantially the party. It is not sufficient that a state may be consequentially affected; for in such case, as where the grants of different states are brought into litigation, the circuit court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions that have been founded on the remote interest of the state, in making retribution to her grantees upon the event of an eviction.

It is not contended that the states are nominally the parties; nor do I think that they can be regarded as substantially the parties to the suits; nay, it appears to me that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil they may contest it at any time in this court, notwithstanding a decision in the present suits; and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision as to the former object between individual citizens can never affect the right of the state as to the latter object; it is *res inter alios acta*. For, suppose the jury in some cases should find in favor of the title under New York, and in others they should find in favor of the title under Connecticut, how would this decide the right of jurisdiction? And on what principle can private citizens, in the litigation of their private claims, be competent to investigate, determine and fix the important rights of sovereignty?

The question of jurisdiction remaining, therefore, unaffected by the proceedings in these suits, is there no other mode by which it may be tried? I will not say that a state could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The state of New York might, I think, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. There being no redress at law would be a sufficient reason for the interposition of the equitable powers of the court, since it is monstrous to talk of existing rights without applying correspondent remedies.

§ 758. *A certiorari will not issue because of a defect of jurisdiction in the inferior court.*

But as it is proposed to remove the suits under consideration from the circuit court into this court, by writs of *certiorari*, I ask whether it has ever happened, in the course of judicial proceedings, that a *certiorari* has issued from a superior to an inferior court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur. If the state is really a party to the suit in the inferior court, a plea to the jurisdiction may be there put in; or, perhaps, without such a plea, this court would reverse the judgment on a writ of error; and, if the state is not a party, there is no pretense for the removal. A *certiorari*, however, can only issue as original process, to remove a cause and change the *venue*, when the superior court is satisfied that a fair and impartial trial will not otherwise be obtained; and it is sometimes used as auxiliary process, where, for instance, diminution of the record is alleged, on a writ of error; but in such cases the superior court must have jurisdiction of the controversy. And as it does not appear to me that this court has exclusive or original jurisdiction of the suits in question, I am of opinion that the rule must be discharged.

§ 759. *The present is in no sense a controversy between states.*

Opinion by MR. JUSTICE PATERSON.

The rule to show cause why a *venire* should not be awarded to summon a jury from some district other than that of Connecticut or New York cannot be supported. It has, indeed, been abandoned. The argument proceeds on the ground of removing the cause into this court, as having exclusive jurisdiction of it, because it is a controversy between states. The constitution of the United States, and the act of congress, although the phraseology be somewhat different, may be construed in perfect conformity with each other. The present is a controversy between individuals respecting their right or title to a particular tract of land, and cannot be extended to third parties or states. Its decision will not affect the state of Connecticut or New York, because neither of them is before the court, nor is it possible to bring either of them, as a party, before the court in the present action. The state, as such, is not before us. Besides, if the cause should be removed into this court, it would answer no purpose; for I am not able to discern by what authority we could change the *venue*, or direct a jury to be drawn from another district. As to this particular there is no devolution of power either by the constitution or law. The authority must be given; we cannot usurp or take it.

If the point of jurisdiction be raised by the pleadings, the circuit court is

competent to its decision, and, therefore, the cause cannot be removed into this court previously to such decision. To remove a cause from one court to another, on the allegation of the want of jurisdiction, is a novelty in judicial proceedings. Would not the *certiorari* to remove be an admission of the jurisdiction below? Neither of the motions is within the letter or spirit of the constitution or law. How far a suit may, with effect, be instituted in this court to decide the right of jurisdiction between two states, abstractedly from the right of soil, it is not necessary to determine. The question is a great one; but not before us. I regret the incompetency of this court to give the aid prayed for. No prejudice or passion, whether of a state or personal nature, should insinuate itself in the administration of justice. Jurymen, especially, should be above all prejudice, all passion, and all interest in the matter to be determined. But it is the duty of judges to declare, and not to make, the law.

Opinion by MR. JUSTICE CUSHING.

These motions are to be determined, rather by the constitution and the laws made under it, than by any remote analogies drawn from English practice. Both by the constitution and the judicial act, the supreme court has original jurisdiction where a state is a party. In this case the state does not appear to be a party, by anything on the record. It is a controversy or suit between private citizens only; an action of ejectment, in which the defendant pleads to the jurisdiction that the land lies in the state of New York, and issue is taken on that fact.

Whether the land lies in New York or Connecticut does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend on very different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens, who are parties to the suit, and the event only give the land to the plaintiff or defendant; but could have no controlling influence over the line of jurisdiction; with respect to which, if either state has a contest with the other, or with individuals, the state has its remedy, I suppose, under the constitution and the laws, by proper application, but not in this way; for she is not a party to the suits. If an individual will put the event of his cause in a plea of this kind, on a fact which is not essential to his right, I cannot think it can prejudice the right of jurisdiction appertaining to a state. I agree with the rest of the court, that neither of the motions can be granted.

Rule discharged.

EX PARTE BARRY.

(2 Howard, 65, 66. 1844.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a petition filed in this court for a writ of *habeas corpus* to be awarded to bring up the body of the infant daughter of the petitioner, alleged to be now unlawfully debarred from him, and in the custody of Mrs. Mary Mercein, the grandmother of the said child, in the district of New York. The petitioner is a subject of the queen of Great Britain; and the application in effect seeks the exercise of original jurisdiction in the matter upon which it is founded. No application has been made to the circuit court of the United States for the district of New York, for relief in the premises, either by a writ of *habeas corpus* or *de homine replegiando*, or other-

wise; and, of course, no case is presented for the exercise of the appellate jurisdiction of this court by any review of the final decision and award of the circuit court upon any such proceedings. Nor is any case presented for the exercise of the appellate jurisdiction of this court upon a writ of error to the decision of the highest court of law and equity in the state of New York, upon the ground of any question arising under the twenty-fifth section of the judiciary act of 1789, ch. 20 (1 Stats. at Large, 85).

§ 760. *The supreme court has no power to issue writs of habeas corpus except in aid of its ordinary jurisdiction.*

The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now, the constitution of the United States has not confided any original jurisdiction to this court, except "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." The present case falls not within either predicament. It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition; and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution or laws of the United States. Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the judge of this court, assigned to that circuit and district, creates no legal obstruction to the pursuit thereof.

§ 761. **Suits between states.**—The supreme court has jurisdiction of a suit between two of the states, brought to settle a question of boundary between them. The court may order a judgment on *ex parte* testimony, and if the defendant state, being duly served with process, fails to appear, a judgment may be ordered. *State of New Jersey v. State of New York*, 5 Pet., 288. See § 727.

§ 762. In a suit between two states, in the United States supreme court, to settle a boundary, the United States may intervene by its attorney-general, adduce evidence and argue. There is no need of its being made a formal party, since there is no way in which it can revise the decree. *Florida v. Georgia*, 17 How., 478.

§ 763. The supreme court of the United States has jurisdiction of an original bill to settle the boundary line between two states. The fact that such decision involves limiting the sovereignty of a state over its subjects and construing compacts between states does not defeat the jurisdiction. *Virginia v. West Virginia*, 11 Wall., 53.

§ 764. In cases where a state is a party, the supreme court of the United States acts under the grant of original jurisdiction in such cases given by the constitution, and exercises this jurisdiction according to rules of practice prescribed by itself without the necessity of any act of congress. *Commonwealth of Kentucky v. Dennison*, 24 How., 96. See § 720.

§ 765. Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution. That court, however, may exercise its original jurisdiction in suits against a state under the authority of the constitution and acts of congress. The rules respecting the process, the persons on whom it is to be served, and the time of service, are fixed; also the proceedings on failure of the state to appear. *State of New Jersey v. State of New York*, 5 Pet., 287.

§ 766. **Injunction by state against secretary of war.**—The supreme court of the United States, in the exercise of its original jurisdiction, cannot entertain a bill brought by a state against the secretary of war and others to restrain them, as representatives of the executive of the United States, from carrying into execution the reconstruction acts of 1867, on the ground that, by them, the existing government of the state would be destroyed and another set up. This is a political, not a judicial, question. *State of Georgia v. Stanton*, 6 Wall., 76.

§ 767. **Suit between state and citizen of another — Political rights.**— The supreme court of the United States has no jurisdiction of a controversy between a state and citizens of another state, if that controversy involves only political rights, and makes no case of danger to private rights or private property. *Ibid.*

§ 768. **The eleventh amendment to the constitution applied to suits pending at the time of its adoption.** *Hollingsworth v. Virginia*,* 3 Dal., 378.

§ 769. **Equity jurisdiction.**— The supreme court of the United States has an equitable jurisdiction to restrain by injunction, on suit by a stockholder, the directors of a corporation from doing acts which amount to a violation of the charter, or to prevent any misapplication of the capital or profits, if such acts amount to a breach of trust. *Dodge v. Woolsey*, 18 How., 341 (CORP., §§ 565-573).

§ 770. The supreme court of the United States, in the exercise of its equity jurisdiction in a suit between citizens of different states, will enforce, besides the general principles of equity, a state statute affecting the land in dispute. *Wickliffe v. Owings*, 17 How., 50.

§ 771. The supreme court of the United States has full equity jurisdiction, founded on the principles and practice of the English court of chancery, and will, when a proper case is made out, restrain by injunction a public nuisance. *State of Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How., 563.

§ 772. **Extent of — Judicial notice.**— As the jurisdiction of the United States supreme court extends over the whole of the Union, its judges take judicial notice of the laws and courts and jurisdictions of the various states. *Pratt v. Willard*, 6 McL., 26.

§ 773. **In admiralty.**— The supreme court of the United States has only an appellate jurisdiction in admiralty. A claim cannot be filed there for the first time. *The Harrison*, 1 Wheat., 299.

§ 774. **To command United States to refund money.**— The supreme court of the United States has no authority to make an order commanding the United States to refund money paid to it. *Ex parte Morris*, 9 Wall., 605.

§ 775. **Original and appellate — Mandamus.**— The jurisdiction conferred upon the supreme court of the United States by the constitution is original in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all others its jurisdiction is appellate. It has therefore no original jurisdiction to issue a *mandamus* not falling in either of the above classes, nor can a statute of the United States giving it such power have any effect, being unconstitutional. If the issuing a *mandamus* is necessary as auxiliary to the appellate jurisdiction of the supreme court, it may be issued; but a *mandamus* issued to an officer for the delivery of a paper is, in effect, an original action for that paper, and is therefore the exercise of original, and not appellate, jurisdiction. *Marbury v. Madison*, 1 Cr., 175.

§ 776. The supreme court of the United States has no jurisdiction to issue a *mandamus* to the register of the land office at a town, commanding him to enter the application of the plaintiff for a certain tract of land, under the provisions of act of congress, 10th May, 1800. The court has not original jurisdiction to issue the writ, nor has it appellate jurisdiction arising from the fact that the parties had submitted the question to the supreme court of a state and the state court had dismissed the motion. *M'Cluny v. Sillman*, 2 Wheat., 370.

§ 777. **Mandamus.**— The supreme court of the United States has authority, by the thirteenth section of the judiciary act of 1789, to issue *mandamus* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the United States. Circuit courts can only issue *mandamus* when necessary to enforce their jurisdiction. *United States v. Addison*, 22 How., 183.

§ 778. When a federal court of inferior jurisdiction has disbarred an attorney in a case where it had no jurisdiction, a *mandamus* will issue from the United States supreme court to reverse this action. *Ex parte Bradley*, 7 Wall., 377 (ATTORNEYS, §§ 21-29).

§ 778a. **Agreed statement.**— While an action was pending before the circuit court for the district of New York, the parties made an agreed statement of facts and requested the opinion of the supreme court thereon, agreeing that judgment should be entered in the circuit court in conformity with the opinion. *Held*, that matters may be brought before the supreme court only by the regular process of law, and not by an agreed statement of facts. *Dewhurst v. Coulthard*,* 3 Dal., 409.

§ 778b. **Case under a treaty.**— When a defendant in ejectment sets up an outstanding title in a party under whom he does not claim, and the validity of this title depends upon the effect of a treaty, this is not a case arising under a treaty, within the jurisdiction of the supreme court. *Owings v. Norwood*,* 5 Cranch, 344.

§ 779. **Constitutionality of state laws.**— The United States supreme court is the final court to decide upon the constitutionality of a state law, *e. g.*, whether it infringes the obligation of a contract. *Dodge v. Woolsey*, 18 How., 350 (CORP., §§ 565-573).

§ 780. — and acts of congress.—The supreme court of the United States is the final arbiter of the constitutionality of the laws of the United States and acts of congress. *The Mayor v. Cooper*, 6 Wall., 253.

§ 781. Congress cannot subject the judgments of the United States supreme court to the revision or correction of any other tribunal. *United States v. O'Grady*, 22 Wall., 648.

§ 782. Certiorari to military commission.—The United States supreme court has no jurisdiction to issue a writ of *certiorari* to review the decision of a military commission. That is not a court. *Ex parte Vallandigham*, 1 Wall., 243.

§ 783. Appellate jurisdiction over circuit court for District of Columbia.—The supreme court has jurisdiction to re-examine and reverse or affirm any final judgment, order or decree in the circuit court for the District of Columbia, wherein the matter in dispute, exclusive of costs, shall exceed the value of \$100. *Custiss v. Georgetown, etc., Turnpike Co.*,* 6 Cr., 233.

§ 784. Remission of case from general term of circuit court to special term.—The supreme court has no power to remit a case of treason depending for trial, before the regular term of the United States circuit court, to a special term of the circuit court, for the sake of trying the case nearer to the scene of the actions. *United States v. Hamilton*, 3 Dal., 18.

§ 785. Ordering a reargument.—It must be a very strong case indeed to induce the supreme court of the United States to order a reargument in any of the causes which have once been argued and decided by them. *Inglis v. Sailors' Snug Harbor*, 3 Pet., 192.

§ 786. Appeals from territorial courts of Florida.—Under the act of February 22, 1847, the supreme court has jurisdiction of all cases, civil or criminal, brought to it on appeal or writ of error, from the territorial courts of Florida. *Forsyth v. United States*,* 9 How., 571.

V. JURISDICTION OF THE CIRCUIT COURT.

1. In General.

§ 787. Supervisory jurisdiction over district court.—The only supervisory jurisdiction exercised by the circuit court of the United States over the district court is to re-examine and reverse or affirm the final decrees and judgments of the district court, and it can do this only by appeal or writ of error. It has no authority to order, by *mandamus*, the district court to vacate a rule made in a case allowing an amendment to the record. *Smith v. Jackson*, 1 Paine, 455.

§ 788. Appellate jurisdiction over state supreme court.—The United States circuit court has no power, by agreement of parties, to compel the supreme court of a state to revise or allow amendments to its process, for this would be exercising an appellate jurisdiction over that court. *Kent v. Roberts*, 2 Story, 598.

§ 789. Review of decree by court of another circuit.—A decree rendered in the circuit court of the United States for one circuit, and on appeal to the supreme court affirmed, cannot be reviewed by the circuit court for another circuit, unless it is alleged that the decree was fraudulently obtained. *Clark v. Hackett*, 1 Cliff., 272.

§ 790. Where the United States is plaintiff.—The circuit court, having jurisdiction of all suits at common law, etc., where the United States is plaintiff (U. S. R. S., § 629, cl. 3), has jurisdiction of an action of *assumpsit* brought by the United States as successor to the insurgent government of Virginia, for a debt due the insurgent government. *United States v. Smith*, 1 Hughes, 354.

§ 791. This court has jurisdiction of a creditors' bill in which the United States are plaintiffs, and the amount in controversy exceeds \$500, exclusive of costs, under the eleventh section of the judiciary act. *United States v. Stiner*, 8 Blatch., 544.

§ 792. When a proceeding for the condemnation of land for federal use is brought by the secretary of the treasury, the proceeding is one in which the United States is plaintiff in such a sense as to give the circuit court jurisdiction under the judiciary act of 1789. *United States v. Block* 121, 3 Biss., 217.

§ 793. When the United States are plaintiffs in a proceeding in which the value in dispute exceeds \$500, the circuit court will have jurisdiction under the judiciary act of 1789, if the proceeding is a civil suit at common law or in equity; and this includes not only suits known to the law at the time when the act was passed, but any proceeding authorized by the statutes of the United States. Therefore, a proceeding to condemn land for the purposes of a custom-house, brought by the United States under the provisions of act of congress of December 21, 1871 (17 U. S. Stat., 24), is such a civil suit at law or in equity, and the United States circuit court has jurisdiction of it. *Ibid.*

§ 794. Suits by or against states.—A state cannot maintain an action as plaintiff in a circuit court of the United States. *Wisconsin v. City of Duluth*, 4 Ch. Leg. N., 405; 11 Am. L. Reg. (N. S.), 709.

§ 795. The circuit courts of the United States do not have jurisdiction of causes in which a state is plaintiff, and citizens of another state defendants. *Quære*, whether under the constitution the jurisdiction of the supreme court is not exclusive so far as the federal courts are concerned. *Ibid*.

§ 796. When a suit is brought against the governor of a state in his official capacity, for property which he holds in behalf of the state, under the laws of the state, the suit is in reality against the state, and the circuit court has no jurisdiction of such a case. *Governor of Georgia v. Madrazo*, 1 Pet., 124.

§ 797. When a state owns all the stock in a bank incorporated under its laws, the circuit court still has jurisdiction of a suit brought against the bank, for the state is not a party to the suit. *Bank of Kentucky v. Wister*, 2 Pet., 326 (BANKS, §§ 265-269).

§ 798. In matters affecting consuls.—A suit was brought against a firm in the circuit court of the United States, and the jurisdiction was sustainable only on the ground that one of the members of the firm was a consul in the United States of a foreign power. The court held that this firm was not liable, but that the members of a former firm were; that the consul was not a member of such former firm, and therefore was not liable; and that one of the members of the firm sued was liable, because having been a member of the former firm. It was therefore held that the court had no jurisdiction to render judgment against this defendant who was liable, since the jurisdiction depended on his being liable as a partner of the consul, and he was not so liable. *Bixby v. Janssen*,* 6 Blatch., 315. See CONSULS.

§ 799. The jurisdiction given by the federal constitution to the supreme court of the United States in suits concerning consuls is original and not exclusive; neither is the jurisdiction conferred upon the federal district court by the ninth section of the judiciary act. The circuit court has original jurisdiction of a writ of *ne exeat regno*, brought against a consul. *Graham v. Stucken*, 4 Blatch., 53.

§ 800. Act of congress of September 24, 1789, § 9, giving jurisdiction of suits against foreign consuls to the circuit court of the United States, is not unconstitutional as violating section 2 of article 3 of the federal constitution. The grant to the supreme court of jurisdiction of suits against consuls is not exclusive. *Gittings v. Crawford*, Taney, 2.

§ 801. A foreign consul is liable to suit in the United States circuit court. He is protected by act of congress from suits in the state courts only. *St. Luke's Hospital v. Barclay*, 3 Blatch., 265.

§ 802. *Mandamus*.—The circuit court of the United States has no jurisdiction to issue a writ of *mandamus* as an exercise of original jurisdiction, under the judiciary act or the act of June 1, 1872. *United States v. Union Pacific R. Co.*, 2 Dill., 529. See WRITS.

§ 803. The circuit court of the United States has power to issue a writ of *mandamus* only when it is necessary as an auxiliary to its jurisdiction in other cases. It has not, therefore, power to issue such a writ to the register of a land office, commanding him to issue a final certificate of purchase, as this is an original writ, not auxiliary. *McIntire v. Wood*, 7 Cr., 506.

§ 804. When creditors of counties have sued in the United States circuit court and obtained judgments, and the counties fail to pay the judgments, the circuit court will grant writs of *mandamus* to the county officers to collect taxes enough to pay the judgments; and if, by reason of public excitement, the county officers refuse or are unable so to do, writs of *mandamus* will be issued to the United States marshal to collect the taxes. *Lansing v. County Treasurer*, 1 Dill., 522.

§ 805. When a non-resident plaintiff, holder of the bonds of a county, sues on them in the circuit court of the United States, and gets judgment, the federal court will grant a writ of *mandamus* to compel the county officers to pay the judgment out of a fund collected by them by the levy of a special tax for that purpose. *United States v. Buchanan County*, 5 Dill., 286.

§ 806. When a county is authorized by statute to issue bonds to aid the construction of a railroad, and does so, a special power is implied to levy a special tax to pay the bonds, unless some statute expressly prohibits it; and a federal court will, in a proper case, issue a *mandamus* to compel such levy. If, subsequent to the issue of the bonds, a statute is passed by the state providing that, instead of the county officers levying the tax, application must be made to the county court to direct the county attorney to move in the state circuit court for the levy of such a tax, the statute impairs the obligation of the bond contract, and the federal court will issue a *mandamus* as before, regarding the state act as unconstitutional. *United States v. Johnson County*, 5 Dill., 193.

§ 807. Although the circuit courts generally have only power to issue a writ of *mandamus* when it is necessary to the exercise of their jurisdiction (*McIntire v. Wood*, 7 Cr., 504), yet the circuit court of the District of Columbia, which has jurisdiction of all cases in law and equity, may issue this writ as an original writ when a clear case at law is made out for it. *United States v. Kendall*, 5 Cr. C. C., 173.

§ 808. **Non-resident defendant.**—If parties defendant to a suit in the circuit court of the United States are out of the jurisdiction of that court, the plaintiff may discontinue as to them, and proceed against the defendant who is within the jurisdiction. *Inbusch v. Farwell*, 1 Black., 572.

§ 809. When suit is brought in the circuit court of the United States against defendants who are non-residents of the district of the court, and are only served with process outside that district, the court has no jurisdiction of the case. *Van Antwerp v. Hulburd*, 7 Blatch., 432.

§ 810. Where a suit was brought in the circuit court of the United States for the district of Indiana by a citizen of New York, a stockholder in a railroad corporation of Indiana, against that corporation and one of its directors, a citizen of Ohio, it was held that under the eleventh section of the judiciary act and the act of February 28, 1839, the court had jurisdiction of the person of the director. *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss., 90 (CORP., §§ 1565-73).

§ 811. If one who is made a party defendant to a suit in the United States circuit court does not reside in the district of that court, nor is served, yet if he appears and files his answer, the court has jurisdiction of him. *Turner v. Indiana, Bloom. & W. R'y Co.*, 8 Biss., 383.

§ 812. **A voluntary appearance and answer** by the defendant in a suit in the United States circuit court waives all defects of service, and gives the court jurisdiction of his person, although he neither resides nor has been personally served with process within the district of the court. *Segee v. Thomas*, 3 Blatch., 14.

§ 813. **Service on attorney.**—When a party, residing out of the jurisdiction of a circuit court of the United States, has obtained a judgment at law, which is sought to be enjoined by a bill in equity filed in the same court by the defendant in the judgment, or where a non-resident has brought suit in equity, and a cross-bill is filed by the defendant, by order of the court, service upon the attorney of the non-resident is sufficient. *Ibid.*

§ 814. **Suit about land outside the district.**—Although when a suit at law is merely brought to try a title to lands, and the lands lie outside the district of the circuit court of the United States in which the suit is brought, that court has no jurisdiction; yet, if the suit is a suit *in equity* and is based on a trust or fraud, since equity acts only *in personam*, the circuit court has jurisdiction if the defendant is found in its district. *Massie v. Watts*, 6 Cr., 158.

§ 815. **Nuisance without the district.**—*Quære*: Where noxious vapors are generated at a place without the jurisdiction of the court, but transmitted by the wind to the plaintiff's residence, which is within the district, so as to make a nuisance there, to enjoin which he files a bill in the circuit court, the court has jurisdiction? *Keyser v. Coe*, 9 Blatch., 33.

§ 816. **Restraining use of patent outside the district.**—An application for an injunction to restrain the defendant from infringing a patent will be refused if it appears that the defendant resides and carries on the business against which an injunction is prayed, outside of the district of the circuit court in which the application is made, although the defendant appears and answers the suit. *Goodyear v. Chaffee*, 3 Blatch., 270.

§ 817. **Equity jurisdiction.**—Although the state in which a circuit court of the United States sits may have no chancery jurisdiction, yet the circuit court has, and though, by the state law, an equitable title may be set up in an action of ejectment, such title cannot be set up in the circuit court. The United States circuit court has a common law jurisdiction and an equitable jurisdiction as known at common law, not by statute. *Swayze v. Burke*, 12 Pet., 23.

§ 818. **Suit to recover proceeds of prize.**—A neutral ship and cargo were captured by an American privateer and taken to Martinique, where, there being no prize court, the governor ordered the cargo to be sold and the proceeds held by the agent of congress. Suit was brought by the captors to recover these proceeds in the United States circuit court, in an action at law. It was held that the cause was exclusively one of admiralty jurisdiction. *Bingham v. Cabbot*, 3 Dal., 33.

§ 819. **Bill for an account against assignee in bankruptcy.**—A bill by creditors to compel an assignee in bankruptcy to account is within the jurisdiction of the United States circuit court. *Lucas v. Morris*, 1 Paine, 396.

§ 820. **Creditors' bill — Forfeiture of franchise.**—A state law enacted that if judgment against a corporation was not satisfied in one year, the proper court should declare the franchise forfeited, appoint a receiver and sell the property to pay debts. A. obtained judgment in the United States circuit court against a corporation and it remained so unpaid. He then brought a bill in equity to have the franchise declared forfeited and a receiver appointed, but made no allegations of *nulla bona*, such as are usual in a creditors' bill. The court held that it had no authority to declare the franchise forfeited; that could only be done by the legislature; but it retained the bill and allowed proper amendments to make it a creditors' bill and then appointed a receiver. *Gaylord v. Fort Wayne, etc., R. Co.*, 6 Biss., 286.

§ 821. **Ransom bill.**—Although ransom bills and questions of prize are cognizable only in a court of admiralty, yet the circuit court, sitting as a court of common law, will take jurisdiction of a case on a bill of exchange given as collateral security for the payment of a ransom bill, although the consideration of the bill is releasing a ship captured as prize, and cannot be inquired into by the court at common law. *Maissonnaire v. Keating*, 2 Gall., 339.

§ 822. **Enjoining suit at law.**—When the circuit court of the United States has jurisdiction of a suit at law by reason of the citizenship of the parties, and also jurisdiction, for the same reason, of a bill in equity brought to restrain the suit at law, by injunction, it will, if a suitable case is made out for equitable interference, enjoin the suit at law. *City Bank v. Skelton*, 2 Blatch., 27.

§ 823. **Setting aside decision of land register.**—The decisions and actions of the land department of the federal government are not in general subject to review by the courts; but where a bill in equity is brought in the United States circuit court, to set aside, for fraud and corruption, a decision of the land register, issuing a plat of land to one who had no valid title, in consideration of a gift of part of the land, the court will take jurisdiction of the case. *Leitensdorfer v. Campbell*, 5 Dill., 422.

§ 824. **Bridge over navigable waters.**—The circuit court of the United States has jurisdiction of a case involving the authority of a company to build a bridge over navigable waters. *Hatch v. Wallamet Iron Bridge Co.*, 7 Saw., 131.

§ 825. **Seizure under revenue laws — Distribution of proceeds.**—When the circuit court has decreed the condemnation of a vessel seized by the revenue collector for breach of the revenue laws, it has also jurisdiction to entertain supplementary proceedings for the distribution of the proceeds of the sale of the vessel. *M'Lane v. United States*, 6 Pet., 424.

§ 826. **Suit by revenue collector against deputy.**—Under the act of congress, July 13, 1866, section 67 (14 U. S. Stat., 172), a collector of internal revenue may maintain an action in the circuit court of the United States against his deputy and the sureties on the deputy's bond, for money collected by the deputy and embezzled. *Crawford v. Johnson*, Deady, 459.

§ 827. **Suit for penalty.**—The United States circuit court has no original jurisdiction of actions to recover a penalty incurred under the laws of the United States. The suit should be brought in the district court. *Evans v. Bollen*, 4 Dal., 344.

§ 828. **Breach of embargo act.**—The clause of the judicial act, 24th September, 1789, section 9, which confers "exclusive original jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States," does not oust the jurisdiction of the circuit court of an action brought by the United States against one who was liable to a fine for breach of the embargo act of 1809. This is a criminal proceeding, and the "penalties" refer to civil suits. (The case includes a learned discussion of the difference between civil actions for penalties and criminal proceedings.) *United States v. Mann*, 1 Gall., 177.

§ 829. **Bank of United States.**—The act incorporating the Bank of the United States gave it authority to sue in every circuit court. *Osborn v. Bank of United States*, 9 Wheat., 817 (CONST., §§ 2363-87).

§ 830. **Forfeiture of vessel.**—The circuit court has not jurisdiction of an action against a vessel for forfeiture under the laws of the United States. Such an action should, by the ninth section of the judiciary act, be brought in the district court. *Ketland v. The Cassius*, 2 Dal., 365.

§ 831. **Recovery of money lost on a horse race.**—An action under a state statute to recover money lost on a horse race is not a criminal action, and may be prosecuted in the United States circuit court. *Grant v. Hamilton*, 3 McL., 100.

§ 832. **Circuit court for southern district of New York.**—Under the act of congress, April 3, 1818, the jurisdiction of the circuit court for the southern district of New York does not include causes of action which arise in the northern district, but may include causes of action which arise in other states and districts. *Wheeler v. McCormick*, 8 Blatch., 276.

§ 833. **District court with circuit court powers.**—Prior to March 3, 1873, the district court of the United States for the middle district of Alabama was a court invested with circuit court powers. Among these powers was that of receiving and exercising jurisdiction over cases removed from the state courts within its territorial limits. An order, therefore, of a state court within the middle district, removing a case from such court to the circuit court of the United States for the southern district of Alabama as the circuit court for the district in which the suit was pending, was void. *Ex parte State Insurance Co.*,* 18 Wall., 417.

§ 834. **Decision upon plea to jurisdiction.**—The decision of the circuit court upon a plea to its jurisdiction is subject to reversal by the supreme court for error. (Per CURTIS, J.) *Scott v. Sandford*, 19 How., 565.

§ 835. **Conveyance to give jurisdiction.**—A conveyance of land, if *bona fide*, although made so as to enable the grantee to sue in the federal courts, is good, and the motive of the

transfer will not prevent the grantee from suing the defendant if he is a citizen of another state. *Osborne v. Brooklyn City R. Co.*, 5 Blatch., 368.

§ 836. **Removal of cause.**—When a suit is removed from the circuit court of the United States for one district to the circuit court for another, the latter court has the same jurisdiction over the parties that the former would have had. *United States v. Supervisors of Lee Co.*, 2 Biss., 85.

§ 837. **Order where there is no jurisdiction.**—Where the circuit court is without jurisdiction, it is generally irregular to make any order in the cause except to dismiss the suit. But this rule does not apply to the action of the court in setting aside such orders as have been improperly made before the want of jurisdiction is discovered. *Mail Company v. Flanders*,* 12 Wall., 130.

2. Character of the Parties.

a. Citizenship.

(1) In General.

SUMMARY—*Suit by state*, § 838.—*Citizen of the United States*, §§ 839, 840.—*Suit by non-resident for use of a resident*, § 841.—*Suit by non-resident in name of a resident*, § 842.—*All must be competent to sue*, § 843.—*Jurisdiction when some defendants are beyond the reach of process*, § 844.—*Voluntary appearance of defendant*, §§ 845, 846.—*Citizens of different states*, § 847.—*No jurisdiction by omission of necessary party*, § 848.—*No jurisdiction by consent*, § 849.—*Administrators*, § 850.—*Trustees*, § 851.—*Jurisdiction by change of parties*, § 852.—*Citizen of a territory*, § 853.—*Citizen of District of Columbia*, § 854.—*Suit on marshal's bond*, § 855.—*Citizenship of a wife divorced a mensa et thoro*, §§ 856, 857.—*Some defendants not citizens of state where suit is brought*, § 858.—*Interested parties made defendants to give jurisdiction*, § 859.—*Suits between citizens of different states; removal from state court*, §§ 860-862.—*Suits for land*, § 863.—*Jurisdiction by removal where the cause could not have been brought in the federal court*, § 864.

§ 838. The circuit court has no jurisdiction of a suit by a state against a citizen of another state. Such suit must be brought in the supreme court or in a state court. *Wisconsin v. Duluth*, §§ 865-867. See § 999.

§ 839. Under the judiciary act of 1789, the circuit court has no jurisdiction in a suit against a citizen of the United States, residing in a foreign country and having no inhabitancy in any state of the Union, although he has property in the district which may be attached. *Picquet v. Swan*, §§ 868-876. See § 988.

§ 840. Under the constitution the circuit court has no jurisdiction in a suit by an alien against a "citizen of the United States" as such. The latter must be a citizen of a particular state. *Ibid.*

§ 841. In a suit in the circuit court of Mississippi, brought by a citizen of New York upon a note payable to bearer for the use of a Mississippi banking house, the court has jurisdiction because the owner of the legal right to sue is a non-resident. *Bonnafee v. Williams*, § 877.

§ 842. When by state law an official bond is required to run to the governor, so that in suits upon the bond his name appears as plaintiff, he is not a real party to the suit, and the circuit court has jurisdiction of a suit brought in his name by non-residents of the state. *McNutt v. Bland*, §§ 878-880.

§ 843. Where the interest of the several parties plaintiff or defendant was joint, it was necessary, under the judiciary act of 1789, that each be competent to sue or to be sued in the circuit court, in order to give such court jurisdiction. *Strawbridge v. Curtiss*, § 881. See § 964.

§ 844. The act of February 28, 1839, wrought a change in the character of the necessary parties to a suit in the circuit court, and authorizes the prosecution of a suit against citizens of the state where the suit is brought, though they were jointly bound with others who are beyond the reach of process. *Clearwater v. Meredith*, § 882. See § 961.

§ 845. Under the act of February 28, 1839, a citizen of Georgia may maintain suit in the circuit court for Tennessee against a citizen of Tennessee and a citizen of New York, if the latter appear and waive his exemption; and a motion by him to dismiss the bill for want of jurisdiction and for want of equity will amount to such waiver. *Jones v. Andrews*, §§ 883-886.

§ 846. Under the act of February 28, 1839, the circuit court had jurisdiction of a local suit in equity brought in the district where the land was situated, if one of the defendants was

an inhabitant thereof, and the decree would bind those who were duly served with process or who voluntarily appeared. *Ober v. Gallagher*, §§ 887-891.

§ 847. Under the act of March 3, 1875, extending the jurisdiction to controversies between "citizens of different states," it is not necessary that any party be a citizen of the state where the suit is brought. *Ibid.*

§ 848. Where one of the defendants, joint contractors, is a citizen of the same state as the plaintiff, a mere omission to serve process upon such defendant will not confer jurisdiction upon the federal court. *Lovejoy v. Washburne*, § 892. See § 934.

§ 849. When, in bringing an equity suit in the circuit court, a necessary party defendant is omitted, he cannot be subsequently brought in, even by consent, if his citizenship is such as to defeat the jurisdiction. *Brigham v. Ludington*, §§ 893-895. See § 926.

§ 850. The citizenship of the administrator, and not that of his intestate, determines the question of jurisdiction in an original suit in the circuit court. *Rice v. Houston*, § 896. See § 973.

§ 851. The right of trustees to sue in the circuit court depends upon their own citizenship, and not at all upon that of their *cestuis*. *Coal Co. v. Blatchford*, §§ 897, 898.

§ 852. The circuit court may take jurisdiction of a case brought by an alien against a citizen, although in the suit as originally instituted appeared as plaintiff the name of one whose citizenship would have defeated jurisdiction, but whose name has since been dropped. *Conolly v. Taylor*, § 899.

§ 853. A citizen of a territory cannot, under the judiciary act, sue as a citizen of a state in the federal courts. *New Orleans v. Winter*, § 900.

§ 854. A citizen of the District of Columbia is not a citizen of a state within the meaning of the clauses in the judiciary act conferring jurisdiction on the circuit court. *Hepburn v. Ellzey*, § 901. See § 935.

§ 855. The federal courts have jurisdiction in suits by individuals on a marshal's bond, even where all parties are citizens of the same state, under act of April 10, 1806. *Adler v. Newcomb*, § 902. See § 1015.

§ 856. A wife divorced *a mensa et thoro* may acquire a different domicile from her husband, and thus be able to sue in a circuit court for arrears of alimony. *Barber v. Barber*, §§ 903-912. See § 1011.

§ 857. A wife divorced *a mensa et thoro* in New York, and by the laws of that state recognized as a citizen thereof, may as such citizen maintain suit against her husband in the circuit court of the district of his domicile. *Ibid.*

§ 858. It is not fatal to the jurisdiction of the federal court, if it appear by the bill that some of the defendants are not citizens of the state where the suit is brought. *Pond v. Railroad Co.*, §§ 913-915.

§ 859. In a suit by certain stockholders against the company it is not a sufficient plea that some of the defendants are in interest with the complainants and are made defendants only to give the court jurisdiction by reason of citizenship, provided that the court as a court of equity has a real ground of jurisdiction against these defendants. The motives in making them defendants are not material. *Ibid.*

§ 860. Congress may, under the constitution, give to the federal courts jurisdiction in all controversies of whatever nature between citizens of different states. *Gaines v. Fuentes*, §§ 916-921. See § 1021.

§ 861. The act of March 2, 1867, extended the jurisdiction of the court, by removal from state courts, to all such controversies, provided the amount in dispute was \$500. *Ibid.*

§ 862. Under this act a respondent, if a citizen of another state, has a right to remove into the circuit court a suit to annul a will and to recall a decree admitting it to probate, although federal courts have no probate jurisdiction, provided the respondent thinks that he will fail of justice through local prejudice. *Ibid.*

§ 863. The circuit court has jurisdiction, by removal, of suits between citizens of the same state, claiming lands under grants of different states, although the lands in question were located upon warrants issued by one of those states, before the separation of the other state from it. *Colson v. Lewis*, § 922.

§ 864. The circuit court has jurisdiction of a cause removed from a state court, where the parties are citizens of different states, even though the action could not have been brought originally in that court by reason of the restriction in section 11 of the judiciary act relating to suits by assignees. *Green v. Custard*, § 923.

[NOTES.— See §§ 924-1037.]

WISCONSIN *v.* DULUTH.

(Circuit Court for Minnesota: 2 Dillon, 406-414. 1872.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—The case comes before us at this time for a preliminary injunction, and the defendants raise the question of the jurisdiction of the circuit court, and move to dismiss the bill on that ground. The question thus presented is whether a state of the Union can maintain a suit in a circuit court of the United States. It is one of interest and of great importance. As we shall presently see, it does not appear to have ever been decided by the supreme court, and has only received the attention of the circuit courts in two or three reported cases. It is not claimed in behalf of plaintiff that the jurisdiction can be maintained on the nature of the rights asserted in the bill without regard to the character of the parties, but it is insisted that, as one of the states of the federal Union, Wisconsin can sustain any action which can properly be brought in a circuit court.

§ 865. *Jurisdiction in cases in which a state is a party, as far as conferred by the constitution, is in the supreme court alone.*

The constitution, in the second section of the third article, declares that the judicial power shall extend to controversies between a state and citizens of another state; and as the defendant Luce and the city of Duluth are undeniably citizens of the state of Minnesota, the case in that respect comes within that provision of the fundamental law. The succeeding clause, however, of the same section, in defining the jurisdiction of the supreme court, the only court established by the constitution, uses language which cannot be disregarded in this connection. 'It says that in all cases affecting ambassadors, other public ministers and consuls, and those in which a *state shall be a party*, the supreme court shall have original jurisdiction. In all *other* cases before mentioned, it shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

As this is a case in which a state is a party, the supreme court undoubtedly has original jurisdiction of it, if it is one to which the power of the federal judiciary extends; and this jurisdiction it has without the aid of any act of congress, for it is conferred in clear and express terms by the constitution. Nor is this affected by the eleventh amendment to the constitution, for that only protects the states from suits commenced or prosecuted *against* them when brought by citizens of another state, or of a foreign state. It may, therefore, be safely affirmed that the supreme court would have jurisdiction of this suit, so far as the character of the parties can give it, if brought in that court. *Pennsylvania v. The Wheeling Bridge Company*, 13 How., 518.

As that court has original jurisdiction of such suits, it would seem that it cannot have in any such case appellate jurisdiction. The section in the constitution which confers it as original is followed by the declaration that in all *other* cases before mentioned the supreme court shall have appellate jurisdiction. Did the framers of the constitution intend to give to the supreme court both an original and appellate jurisdiction in the same class of cases founded in the character of the parties? Or did it by this clause intend to define the cases in which it should have original, and those in which it should have appellate, jurisdiction, and to distinguish and separate them from each other? The natural import of the language used, defining specially the cases in which it has original jurisdiction, and declaring that in all others its jurisdiction shall

be appellate, favors very strongly the idea that in those classes of cases of which it has original cognizance, it can have no appellate jurisdiction. If this be a sound exposition of the constitution, it follows that if there is in the circuit courts a jurisdiction concurrent with the supreme court in cases to which a state is a party, no appeal or writ of error can be taken when the suit is brought in the former. This would be an anomaly in our system of jurisprudence, which stands alone, and it weighs very heavily against a construction of the act of congress creating the circuit courts, and conferring their powers, which brings such cases within their jurisdiction by mere implication.

But waiving this view of the subject for the present, these propositions may be fairly deduced from the constitution in regard to suits brought by a state against citizens of another state: 1. That the judiciary power of the federal government extends to such cases. 2. That the supreme court has original jurisdiction of such cases. 3. That jurisdiction is conferred on no other court of such cases by the constitution *propria vigore*.

Conceding, then, that the jurisdiction of the supreme court, as derived from the constitution, is not exclusive in this class of cases, we must still look to some other source of authority than that instrument when a concurrent jurisdiction is claimed for some other court. It may also be conceded, and perhaps that is the established doctrine, that the states have lawfully conferred such a power on their own courts when exercised on persons or property within their territorial limits, and that to this extent such a concurrent jurisdiction exists. But when it is claimed for any other federal court than the supreme court, the power must be found in an act of congress. It is a proposition which admits of no further debate, and needs the citation of no authorities at this day, that all courts of the United States, except the supreme court, being the mere creatures of congressional statute, can exercise no jurisdiction but such as is given by those statutes; and even the supreme court is limited in all except the original jurisdiction given it by the constitution—a very small portion, indeed, of the power which it exercises—by the will of congress as expressed in its legislation.

§ 866. *The judiciary act gives no jurisdiction to the United States circuit courts in cases in which a state is a party.*

We turn, then, to the act of 1789, establishing the judiciary system of the United States, to which alone we can look for the requisite authority; for though there are many subsequent statutes conferring jurisdiction on the federal courts, there are none which can affect the question before us. The fourth section of that act creates the circuit courts, and the eleventh defines their powers and confers their jurisdiction. The latter declares that they shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the *United States are plaintiffs, or petitioner, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state.*

This is all that is to be found in this section conferring jurisdiction on the ground of the character of the parties, and we look here in vain for any jurisdiction where a state is a party. I do not know if the idea has ever been advanced that a state is a mere aggregation of its own citizens, and therefore has the same right to bring suit that any one of its citizens has. It has not been asserted by counsel in the case before us. It certainly cannot be maintained upon any sound view of the constitution. If the word state is used in

that sense in the constitutional provision, it is useless, because there is the provision that the judicial power extends to controversies between citizens of different states, and if a state is but the aggregate of its citizens, then the other is unnecessary.

The clause in that instrument conferring original jurisdiction on the supreme court in cases where a state is a party certainly does not confer jurisdiction when citizens of different states are parties. In view, then, of the constitutional foundation on which alone a state can be a party in the federal courts, no such construction of the statute defining the jurisdiction of the circuit court can be sound. A like conclusion results from an examination of the thirteenth section of the judiciary act. It declares that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction. Now, in all these cases congress makes a very clear distinction between a state and its citizens, and it denies to the supreme court any original jurisdiction between a state and its own citizens, and confers on it jurisdiction original but not exclusive, as between a state and citizens of other states. This latter is the precise class of cases to which the one before us belongs; and it would be a violation of all sound rules of construction to say that the same jurisdiction exactly is conferred on the circuit court, by using the phrase, "controversies between citizens of different states,"—a phrase applied both in this statute and in the constitution to a very different class of controversies from the case under consideration.

This precise question was raised in the case of *Osborn v. The Bank of the United States*, 9 Wheat., 841 (Const., §§ 2363–87), in which the jurisdiction conferred by the constitution, where a state is a party, is held to apply only where a state in its corporate or sovereign character is by name an actual party to the record. It is argued, however, that inasmuch as the constitution, in conferring original jurisdiction in this class of cases on the supreme court, did not make that jurisdiction exclusive, and the thirteenth section of the act of 1789 declares expressly that it shall not be exclusive, that the concurrent jurisdiction which is thus implied to be or remain in some other court must be in the circuit court. It would be a sufficient answer to this to say that if it must necessarily be in a court of the United States, it might as well be sought in the district court as in the circuit court, for there is nothing in the statute defining the jurisdiction of either of those courts which refers to this jurisdiction, even by implication.

But even if the language of the thirteenth section of the judiciary act does imply a concurrent jurisdiction in some other court, we have already seen that such a jurisdiction exists now, and has always probably existed, in the state courts. And the probability that it was to this that the thirteenth section had reference is the stronger, because in many other cases that statute recognizes, both in express terms and by fair implication, such a concurrent power in the state courts with those of the United States. Such is the case with the great body of the jurisdiction of the circuit courts in regard to aliens, citizens of different states, and suits brought by the United States. So, also, of admiralty courts, where the common law furnishes a remedy, and other grounds of jurisdiction of the district courts mentioned in the ninth section of the same statute.

There is every reason, therefore, to infer that congress, in declaring that the

original jurisdiction of the supreme court in this class of cases shall not be exclusive, had reference to the jurisdiction over the same class of cases intended to be left with the state courts, and which, as we have already seen, they have uniformly and constantly exercised without objection. But if congress can confer on the circuit courts an original jurisdiction in this class of cases, concurrent with that of the supreme court, it is a sufficient answer to say that it has not done it. And in the face of the fact that congress has not in any other instance whatever, during a period of over eighty years that the government has existed, attempted to confer on those two courts a concurrent jurisdiction, is an argument of great force against implying such exercise of the power, in the absence of words expressly granting it. It would indeed be curious, if, when the constitution which gave so limited an original jurisdiction to the supreme court, made a suit brought by a state against citizens of another state, one of that limited number, congress had conferred the same jurisdiction on an inferior tribunal without an appeal to the former.

§ 867. *Authorities reviewed.*

Looking at the question which we are considering as it may be affected by the authority of judicial decisions, we have been unable to find, with the limited opportunity which the exigency of this case gives for investigation, any case in which it has been decided that such jurisdiction exists in the circuit court.

Some reference is made to the remarks of the supreme court and in the dissenting opinion of the chief justice in the *Wheeling Bridge Case*, 13 How., 518, which are supposed to favor such a doctrine. But no such question was before the court, and both the chief justice and Justice McLean said nothing more than that the merits of that case, which was an original suit in the supreme court, must be governed by the same rules of law as would govern the circuit court of the district of Virginia, if the case was pending before it; but it does not appear that the question whether the case with such parties could be sustained in that court had occurred to their minds. Such a suit, brought by the state of Indiana, was tried by Mr. Justice McLean in the circuit court, without the question being raised. It is the case of *Indiana v. Miller*, 3 McL., 151, and was removed by consent from the state court and the facts stipulated for the judgment of the court on the case. No thought seems to have been given, either by the court or counsel, to the question of jurisdiction.

On the other hand we have the judgment of the circuit court for the district of Georgia, as stated by Judge Iredell, in the case of *The State of Georgia v. Brailsford*, 2 Dal., 402. The case, as reported in *Dallas*, was a suit brought in the supreme court by the state of Georgia, by a bill in chancery. Judge Iredell, in his opinion, says that in a suit about the same subject-matter before him in the circuit court, he had refused to permit the state of Georgia to intervene, because the circuit court could have no jurisdiction of a case in which a state was a party. He had, then, at that early day, decided this question; and though Mr. Justice Wilson thought it was error, he gives no reason for it which at this day would have any weight. The case of *Gale v. Babcock*, 4 Wash., 199, is also directly in point. Mr. Justice Washington, in that case, remanded it to the state court, on the ground that the circuit courts had no jurisdiction of a suit to which a state was a party. And in a very recent case reported in 5 *National Bankrupt Register*, 466, the circuit court of North Carolina decided the same way. These three are all the direct decisions we have found, and they all deny the jurisdiction.

We are well satisfied that such is the sound construction of the constitution

and the acts of congress bearing on the question; and we have the less reluctance in dismissing the bill, as we must for want of jurisdiction in this court, because we have no doubt that both the state courts of Minnesota and the supreme court of the United States are open to the state of Wisconsin for such relief as she may be entitled to.

DILLON, C. J., concurs.

PICQUET v. SWAN.

(Circuit Court for Massachusetts: 5 Mason, 35-55. 1828.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This suit was commenced by a writ, which is known in this state as the trustee process, but is better known elsewhere as the process of foreign attachment, and was returnable to May term, 1827, of this court. By the state laws it is a process equally applicable to cases where the suit is against an inhabitant, and where it is against a non-resident, whether he has ever been an inhabitant or not. In the writ the parties are described as follows: the plaintiff as “of the city of Paris in the kingdom of France, *an alien*, and subject to his most Christian majesty the king of France, in his capacity as administrator,” etc., and the defendant, as “now commorant of the city of Paris in the kingdom of France, of the city of Boston, in the commonwealth of Massachusetts, one of the United States of America, and *a citizen of the said United States.*”

The return of the marshal on the writ is as follows: “Boston, April 18, 1827. Pursuant hereunto I have attached all the real estate of the said James Swan lying and being in the district of Massachusetts, especially a lot of land in Boston in said district, bounded, etc., called the Washington Garden, etc., and summoned William Sullivan, Esq., *agent for the said Swan*, and on the same day I summoned the within named Sullivan, Otis and Howard [the supposed trustees] to appear and show cause as within commanded, by leaving a true and attested copy of this writ at their last and usual places of abode. *The said Swan has not been an inhabitant or resident within this district for three years last past.*”

At the last term the trustees summoned in the suit were duly discharged. The defendant has never appeared as a party to the suit; and it is now contended that the plaintiff is entitled to consider him in default, and to have a judgment by default entered against him. That is the point which has been argued, and is now to be decided by the court.

§ 868. *Description of Massachusetts trustee process.*

I will briefly advert, in the first instance, to the local laws regulating this process, as they may be important to illustrate the conclusion to which the court has arrived, and also more fully to explain the grounds of the argument at the bar. The trustee process, under which the present suit is brought before the court, owes its origin to the act of 28th of February, 1795 (act of 1794, ch. 65), which was a substitute for the provincial act of 32 Geo. 2, ch. 2, to enable creditors to receive their just debts out of the effects of their absent or absconding debtors. It provides that “the officer to whom the writ is directed shall serve the same by attaching the goods and estate of the principal in his hands and possession of the value required, if so much may be found in his precinct, by reading the said writ to him, or by leaving an attested copy

thereof *at his last and usual place of abode*, if he had been an *inhabitant or resident within this commonwealth at any time within three years next before the suing out such writ*, and by reading the same to each of the trustees, or by leaving an attested copy thereof at such trustees' usual place of abode; and *in case the principal has not been an inhabitant or resident as aforesaid, a service made on the supposed trustee or trustees in manner as aforesaid shall be deemed a sufficient service*," etc. It further provides that in case all the trustees are discharged, "the plaintiff may, notwithstanding, proceed against the principal to trial, judgment and execution." A subsequent statute (act of 1798, ch. 5) has, however, provided that "in all such cases the plaintiff shall not proceed in his suit against the principal, unless there shall have been such service of the original writ upon the principal as would have authorized the court to proceed to render a judgment against him, in an action brought and commenced in the common and ordinary mode of process." But the principal might voluntarily come into court and take upon himself the defense of the suit. In the very case before the court all the trustees have been discharged, so that it is necessary to ascertain what service would be sufficient to entitle the plaintiff to judgment in an action by the common and ordinary mode of process, which is, by our local law, by a writ known by the name of a writ of *capias* or attachment, and authorizing either an arrest of the person of the defendant or an attachment of his goods or estate. The act of 17th of February, 1798 (act of 1797, ch. 50), provides for the mode of service of this process. Of course it can be used as a *capias* only when the party is found within the state. When used as an attachment, the officer attaches the goods or estate of the defendant, and a summons in due form is to be delivered to him or left at "*his dwelling-house, or place of last and usual abode*," fourteen days before the return day; and "*in case the defendant was at no time an inhabitant or resident within this commonwealth*, then such summons is to be left with his or her *tenant, agent or attorney*," etc., otherwise the writ shall abate. There is also provision made in this act, that if the defendant is not an inhabitant or present in the state at the time of the service, and does not return before the time of trial, the court may continue the same to the next term upon a suggestion of the fact on the record. If at such term the defendant does not appear, and be so remote that notice of the suit could not probably be conveyed to him during the vacancy, the court may continue the same to the next term, and *no longer*. After these two continuances, if he does not appear, judgment by default may be entered up against him. It is not material to follow up the proceedings consequent upon such judgment. But it may not be useless to add that the trustee act of 1794, chapter 65, adopts regulations of a similar nature, in substance, to them.

§ 869. *Local processes not adopted by congress so far as to extend jurisdiction of the federal courts.*

Of their own force these processes and modes of service could have no validity in the courts of the United States. But by the act of congress of 29th of September, 1789, chapter 67, the then existing forms of writs and modes of *process* (by which was meant modes of *proceeding*) in the supreme courts of the states, respectively, were adopted into the judicial proceedings of the courts of the United States; and by a subsequent act (act of 1792, ch. 36) the same forms were perpetuated, subject to the authority in the courts to alter and add to the same, in their discretion, so as to conform to the state jurisprudence. After the very elaborate expositions of this subject by the supreme court in

Wayman v. Southard, 10 Wheat., 1, and United States Bank v. Halstead, 10 Wheat., 51, it is unnecessary farther to discuss the nature and extent to which the state process applies in the courts of the United States. The state acts of 1795, chapter 65, of 1797, chapter 50, and of 1798, chapter 5, have never been adopted by any formal rule of the circuit court in this district; but they have constantly been used in it, both as to process and service, ever since their first enactment, and must now be admitted to be of as high authority by usage as if any promulgation by rule, however formal, had taken place. They can have no effect where they contravene the positive legislation of congress; nor can they give a jurisdiction to this court which it might not, independently of them, maintain. Where jurisdiction is given by any act of congress, this court may use the appropriate state process to enforce it. But the state laws can confer no authority on this court to extend its jurisdiction over persons or property whom it could not otherwise reach.

§ 870. *Under the judiciary act of 1789, no judgment could be rendered in a circuit court against any person not within reach of its process.*

Let us, then, first examine the existing legislation of congress on this subject. The constitution of the United States has, among other things, extended the judicial power to controversies between citizens of different states, and between citizens of a state and foreign citizens or subjects. The actual legislation of congress has not as yet been co-extensive with this constitutional boundary of jurisdiction. The judiciary act of 1789, chapter 20, provides “that the circuit court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature where the matter in dispute, exclusive of costs, exceeds \$500, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the state where the suit is brought and a citizen of another state.” As to citizens, therefore, there exists no jurisdiction, unless either the plaintiff or the defendant is a citizen of the state where the suit is brought. As to *aliens*, by which must be understood, in the language of the constitution, “a foreign citizen or subject,” the jurisdiction is in all cases given where an *alien* is a party. In a subsequent part of the same section is the clause which has been so much commented on at the bar. “But no person shall be arrested in one district for trial in another in any civil action before any circuit or district court. And no civil action shall be brought before either of said courts *against an inhabitant of the United States* by any *original process* in any other district than that *whereof he is an inhabitant*, or in which he shall be found at the time of serving the writ.” It is observable that the language is confined to *original* process, and does not apply to *final* process or process of execution.

If this clause had not been inserted, what would have been the legal operation of the other clauses of the act? A prior section had divided the United States into certain judicial districts, whose limits generally were co-extensive with the territorial limits of a single state. Within these districts a circuit court is required to be held at certain times and places prescribed by the act. The circuit court of each district sits within and for the same, and is bounded by its local limits. In the exercise of jurisdiction within those limits, the general principles of law must be presumed to apply to them all. Whatever might be the extent of their jurisdiction over the subject-matter of suits in respect to persons and property, that jurisdiction is available only within the limits of the district. The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot

be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed an usurpation of foreign sovereignty not justified or acknowledged by the law of nations. Even the court of king's bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland or the colonies to compel an appearance or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city or other local district. If it be the former it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority. It was doubtless competent for congress to have authorized original as well as final process to have issued from the circuit courts and run into every state in the Union. But it has conferred no such general authority. In a single case only has it authorized (by the statute of 3d of March, 1797, ch. 74, § 6) writs of execution to run throughout the United States; and that is upon judgments obtained for the use of the United States in any of the courts of the United States. By the act of 2d of March, 1793, ch. 66 [22], § 6, it has also authorized subpoenas for witnesses to attend the courts of the United States to be served in other districts within certain limited distances. And until a very recent statute (act of 20th May, 1826, ch. 123), no authority existed to serve writs of execution, in favor of private persons, in any other district than that where the judgment was rendered, although both districts were within the territorial limits of the same state. This very course of legislation, during a period of almost forty years, demonstrates the understanding of congress, as well as of the profession, that the process of the circuit court could not be served in ordinary cases out of the limits of the judicial district for which it was established. My brother Washington, in his able judgment in the case *Ex parte Graham*, 3 Wash., 456, has gone largely into the consideration of this doctrine; and I follow with undoubting confidence the whole course of his reasoning. I owe it, perhaps, as a matter of justice to myself to add, that the process in that case, from the circuit court of Rhode Island, was issued at the peril of the party, without any deliberate examination of the law on the part of the court, the party being anxious to take it, *valere quantum valere possit*. If, therefore, the restraining clause already mentioned were not in the eleventh section of the act of 1789, ch. 20, I should be of opinion, for the reasons so forcibly given by my brother Washington, that the exercise of the jurisdiction of the circuit courts by compulsive process, was essentially confined by their very organization within the limits of their respective districts. It would otherwise follow that final process might in all cases run into every district of the Union, since the terms of the clause apply to original process only. Yet the professional opinion and practice, as well as the positive legislation of congress in the cases above mentioned, demonstrate that the contrary is the true construction of the act.

The jurisdiction of the circuit court in this case, as far as it depends upon the citizenship and alienage of the parties, may for the present be assumed *de bene esse* to be complete. But this alone is not sufficient to give the court complete authority to proceed to judgment. There must exist other facts and circumstances as a just foundation of jurisdiction. Cases are familiar of actions

which cannot be maintained, although the parties are within the reach of process, from the nature and locality of the cause of action. Suits which concern the realty, such as writs of entry, dower, ejectment and trespass *quare clausum fregit*, cannot be maintained in the circuit court, unless the land lie within the district, although the party reside there, and, in a personal view, the jurisdiction is unexceptionable. The reason is, that the title to real estate can by the general principles of law be litigated only in the state where the land lies, and where the process may go to bind and reach the land, and enforce the title of the party. If, therefore, the land be sought, or in other respects the suit be purely local, it must be brought where the law of the place acts on it directly. See *Massie v. Watts*, 6 Cranch, 148. Collateral suits for other purposes, binding the conscience, or controlling the acts of the party personally, may be brought and decided elsewhere. *Id.* This principle is recognized at the common law; but it has, to a certain extent at least, a foundation also in universal jurisprudence.

I have already intimated that no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals. If a state were to pass an act, declaring that upon personal notice of a suit brought against a foreigner, resident in a foreign country, proceedings might be had against him and a judgment obtained *in invitum*, for aught I know the local tribunals might give a binding efficacy to such judgments. But elsewhere they would be utterly void, as an usurpation of general sovereignty over independent nations and their subjects. Lord Ellenborough, in *Buchanan v. Rucker*, 9 East, 192, has put the case with great clearness and force. "Supposing," said he, "however, that the act had said in terms that though a person sued in the island [of Tobago] had never been present within its jurisdiction, yet, that it should bind him, upon proof of nailing up the summons at the court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such a jurisdiction?" Nor would it in such a case vary the legal result, that the party had actual notice of the suit; for he is not bound to appear to it. No sovereign has a just right to issue such a notice, and thereby to acquire a jurisdiction to draw the party from his own proper forum *ad alium examen*. Where a party is within a territory he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*. If the party chooses to appear and take upon himself the defense of the suit, that might vary the case, for he may submit to the local jurisdiction and waive his personal immunity. Such appear to me to be the principles established by the better opinions in the cases cited at the bar, and particularly in *Phelps v. Holker*, 1 Dall., 261; *Killburn v. Woodworth*, 5 Johns., 37; *Smith v. Brush*, 8 Johns., 84; *Fenton v. Garlrise*, 8 Johns., 194; *Pawling v. Bird*, 13 Johns., 192; *Borden v. Fitch*, 15 Johns., 121;

and *Bissell v. Briggs*, 9 Mass., 462. In the two last cases the learned chief justices of New York and Massachusetts reasoned out the doctrine with great acuteness and ability. The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet farther. In general, it may be said that they authorize no judgment against a party until after his appearance in court. He may be taken on a *capias* and brought into court, or distrained by attachment and other process against his property to compel his appearance, and for non-appearance be outlawed. But still, even though a subject and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court.

The conclusion to be deduced from the foregoing considerations, which must necessarily have been in the contemplation of the framers of the judiciary act of 1789, is, that the whole structure of that act proceeded upon the supposition that, independent of some positive provision to the contrary, no judgment could be rendered in the circuit court against any person upon whom process could not be personally served within the district. This was the natural result of the principles of the common law in relation to jurisdiction and process.

§ 871. *Effect of the clause in the judiciary act forbidding a suit against an inhabitant of the United States in a district other than that wherein he resides or is found.*

In this view of the matter, the clause in the eleventh section already cited was introduced, as my brother Washington supposes it to have been, from abundant caution, to guard against every possibility of latent doubt. And it should be remembered in this connection, that the process act of 1789, which alone gave life to the state process in the United States courts, formed no necessary part of the system and was brought forward by an independent and temporary statute. Let us, then, consider what is the true interpretation to be put upon this clause. It first provides that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." So that it is clear that the process of *capias* is limited to the local boundaries of the court by which it is issued. It next provides that "no civil suit shall be brought before either of said courts *against an inhabitant of the United States* by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ."

Now the argument is, that this last provision applies only to persons who, at the time of the suit, are *inhabitants of the United States*. It is a restriction of the general authority of the courts to bring before them by original process any person, who, as a citizen or alien, was amenable by the general grant of jurisdiction to these courts. Swan was either an inhabitant of Massachusetts at the time when the present suit was brought, or he was not. If he was an inhabitant, then the suit is brought in the proper district; if not an inhabitant, then the restriction is inapplicable to him. Such is the dilemma into which the argument supposes the adverse party to be driven, and on which it seeks to suspend him.

It appears to me that such is not the true interpretation of the words of the clause. They admit of an interpretation, in my view, much more natural and consonant with the principles of justice. The argument supposes that as a general jurisdiction is given in cases *where an alien is party*, if he is not an inhabitant of the United States, and has not any property within it (for to this

extent it must reach), still he is amenable to the jurisdiction of any circuit court, sitting in any state in this Union. So that a subject of England, or France or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process and submit to the judgment of our courts. Such an intention, so repugnant to the general rights and sovereignty of other nations, ought not to be presumed unless it is established by irresistible proof. My opinion is, that congress never had any such intention; that it presupposed that no suit would lie against any person who was not locally present, either as an *inhabitant* or *in transitu* in the United States; and that it designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicile, as well as allowed it in any district where the party might at the time be found. The words of the clause are, "against an inhabitant of the United States." But I lay no particular stress upon the word "inhabitant," and deem it a mere equivalent description of "citizen" and "alien" in the general clause conferring jurisdiction over parties. A person might be an inhabitant without being a citizen; and a citizen might not be an inhabitant though he retained his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, *animo manendi*, quite another. I read, then, the clause thus: "No civil suit shall be brought before either of said courts *against an alien or a citizen*, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ." It cannot be presumed that congress meant to say that if an alien or citizen were not an inhabitant of, or commorant in, the United States, a suit might be maintained against him in any district, and process served abroad upon him, or a judgment given against him without any notice or process served upon him. If it be said that process may be served upon his property within the district, what is to be done when there is no such property to be found or it is merely nominal? If in the latter cases an exception is to be implied upon general principles, why not in the former? The judiciary act of 1789, ch. 20, has not provided for either case in terms; and the right to serve process upon the property of the party, and thereby to bring him into court when an absentee, so as to bind that property or him personally by the judgment, is not a right growing out of the common law, but everywhere, at least in countries governed by the common law, depends upon statute regulations. Looking, therefore, to the plain tenor of this act, and construing it by the real objects which it avows, my judgment is that it contemplates no effective exercise of jurisdiction by the circuit court, except in cases where the party defendant is an inhabitant of, or found within, such district at the time of serving the writ. If no forms of process or modes of proceeding had been prescribed by any other law, I do not see how the courts could have exercised their jurisdiction at all, except by reference to writs, process and service according to the common law, a construction which seems naturally to flow from the provisions of the fourteenth section of the act.

§ 872. *The process acts of congress were not intended to enlarge the jurisdiction of the circuit courts.*

The process acts of 1789, ch. 21, and of 1792, ch. 36, have prescribed the forms of process and modes of service to be according to the state jurisprudence. But they do not appear to me to be intended to enlarge the sphere of jurisdiction of the circuit courts. Whenever the person is an inhabitant of, or found within, the district, the proper writ may issue, and the process may be served

against him, whether it be a *capias*, summons, attachment or otherwise, as the local jurisprudence authorizes. I cannot judicially say that the general phraseology of these process acts ought to receive a more extensive interpretation, so as to break down or interfere with the policy of the judiciary act of 1789, ch. 20, founded, as it seems to me to be, in principles of public law, public convenience and immutable justice. If the state jurisprudence authorizes its own courts to take cognizance of suits against non-residents, by summoning their tenants, attorneys or agents, or attaching their property, whether it be a farm or a debt, or a glove, or a chip, it is not for us to say that such legislation may not be rightful, and bind the state courts. But when the circuit courts are called upon to adopt the same rule, it ought to be seen that congress have, in an unambiguous manner, made it imperative upon them. There is no pretense to say that the circuit court in this district has, by its practice or by rule, sanctioned such a proceeding. If such modes of service have in such cases been used, the matter has passed *sub silentio*, without any knowledge on the part of the court which implied a sanction of it.

No case has been cited in which the question has been brought directly before any court of the United States for a decision. In *Hollingsworth v. Adams*, 2 Dall., 396, there was a foreign attachment in the circuit court of Pennsylvania; but the principal debtor was an inhabitant of Delaware, and not found in Pennsylvania; and the court quashed the writ for want of proper jurisdiction. In *Pollard v. Dwight*, 4 Cranch, 421, the plaintiffs were citizens of Massachusetts and Connecticut, and the defendants were citizens of Virginia, and not found in the district of Connecticut, and were sued in a foreign attachment in the state court, and the cause removed by them into the circuit court for the district of Connecticut. The question was, whether they could be so sued. The supreme court held that "by appearing to the action the defendants in the court below placed themselves precisely in the situation in which they would have stood had process been served upon them, and consequently waived all objection to non-service of process." This was a strong case; for though the suit was between citizens of different states, yet within the terms of the eleventh section of the act of 1789 it was not a suit between a citizen of the state where the suit was brought (for the plaintiffs were partly citizens of Connecticut and partly citizens of Massachusetts) and a citizen of another state. *Shute v. Davis*, Pet. C. C., 431, and *Craig v. Cummings*, *id.*, note, turned on the very words of the statute just cited. The suit in the former case was brought in Pennsylvania between citizens of New York and New Jersey; in the latter, one of the defendants was a citizen of Pennsylvania, and the other not; but the contract being joint and, by the local law, capable of being pursued against one only, the severance was deemed complete by the return of *non est inventus* of the non-resident. *Fisher v. Consequa*, 2 Wash., 382, was a foreign attachment against a non-resident Chinese merchant; but there seems to have been a general appearance for him, and at all events no exception was taken on this particular point. In *Bissell v. Horton*, 3 Day's Cases, 281, in the circuit court in Connecticut, the plaintiffs were described as partly citizens of Vermont and partly citizens of Connecticut. The defendant was described as a citizen of New York, now dwelling in Hebron in Connecticut. The court held that they had no jurisdiction, and on motion dismissed the suit. Mr. Justice Livingston said, "the plaintiffs are partly in Vermont and partly in Connecticut. They are not, therefore, citizens of Vermont within the constitution and laws of the United States. With regard to the defendant, it is admitted

that he now resides in Connecticut, and has resided here during the time in which he has been in possession of the demanded premises, which clearly evinces a determination in him to remain here permanently." This case may, from the shape given to the opinion of the learned judge in the report, be open to some critical observation. Upon the motion to dismiss, the citizenship of the defendant in New York, as alleged in the writ, must have been taken to be true. The process was duly served upon him in Connecticut. And upon the authority of *Pollard v. Dwight*, 4 Cranch, 421, the jurisdiction was maintainable; for the citizenship of one of the plaintiffs in Connecticut was there thought sufficient to bring the case within the act of congress.

I have not met with any other cases, in which the question has been judicially discussed, except *Ex parte Graham*, 3 Wash., 456, already referred to, where the reasoning, so far as it bears at all on this subject, presents itself unfavorably to the maintenance of the present suit.

§ 873. *Conclusions of law from the foregoing.*

If, therefore, I were called upon to decide this case exclusively upon principle, my judgment would lead me to adopt these conclusions: That by the general provisions of the laws of the United States, the circuit courts could issue no process beyond the limits of their districts. That independent of positive legislation, the process can only be served upon persons within the same districts. That the acts of congress, adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court *in personam*, that is, where they are inhabitants or found within the United States; and not where they are aliens or citizens resident abroad at the commencement of the suit, and have no inhabitancy here.

§ 874. *Additional reasons in support of these conclusions.*

There are two reasons which have great weight with me in support of these positions. One is, that otherwise the judgments in the courts of the United States would not, in cases of non-residents, be binding, as general judgments *in personam*; but if at all, only as proceedings *in rem* to the extent of the property attached, whether it be a chip, or a bale of goods, upon the principles of the cases of *Bissell v. Briggs*, 9 Mass., 462; *Buchanan v. Rucker*, 9 East, 192, and other cases before mentioned. Another is, that the forms of process in Massachusetts (which forms are made applicable by the acts of congress to the courts of the United States), both in the common process and the trustee process, whenever goods or estate are attached, require a summons to be served on the party. In the trustee process, the words are, "We command you to attach the goods and estate of A. B. [the defendant] to the value of —, and summons the said A. B. [the defendant], *if he may be found in your precinct [district]*, to appear," etc. Not one word is stated in the writ itself, as to any summons where the party is not found within the precinct or district of the officer. The mode of service in such cases, and in cases of non-residence generally, is prescribed by other distinct acts or sections of acts. So that the exigency of the writ looks only to the fact of the party being found within the district; and unless the marshal is at liberty to make a service in a case and mode beyond the exigency of this writ, not expressly reached by the acts of congress, but dependent entirely upon state laws, made for local purposes, the service in cases of non-residence would be utterly void. The argument for the

plaintiff is, that as the summons is authorized by law, it is sufficiently served by the marshal in any mode, within his district, which the local laws justify. Generally speaking, that may be true, where the party is within the district, or an inhabitant bound to obey the summons within the district, *viis et modis* prescribed by the law. The difficulty is, how to deal with cases where the party is an alien, or a citizen of another state, not resident within any of the United States. Yet the state laws extend to all these cases equally with those where the party is a non-resident citizen of the state where the suit is brought. I know no principle upon which the court can say that the service as to the latter shall be good, and not as to the former; for in each case the sufficiency of the service of the summons must stand upon the same provisions of the state laws. Unless, therefore, the court can say that an alien who has never been within the United States may be rightfully served with a summons or other process by any attachment of his property, however small, within the district, and be bound thereby to appear and submit to the jurisdiction of the court, or otherwise have a judgment against him *in invitum*, I do not perceive how the present case can, on general principles, be maintained. If congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law. The point of difficulty is, whether such a rule ought to be inferred from so general a legislation as congress has adopted, not necessarily leading to the conclusion that such was the intent. It would seem strange that a provision should be so solicitously made for persons inhabiting the country, that they should not be held amenable, except in the districts where they resided; and yet that no protection should be afforded to aliens or citizens who were permanently domiciled abroad.

§ 875. *The service of the summons on the agent of a non-resident is not authorized by the act of Massachusetts of 1797, unless the principal has never been a resident of the state.*

But supposing the preceding reasoning less well founded than, in my judgment, it seems to be, it remains to consider whether, under the circumstances of this case, the service of the process was such as, by the local laws, would justify the judgment of default now asked of this court.

We may lay out of the case all consideration of the service so far as relates to the provisions of the trustee act of 1794, ch. 65, because the trustees having been discharged, no judgment can, by the express provisions of the act of 1798, ch. 5, be rendered against the principal, unless the service has been such as would authorize the court to proceed to render judgment against him in an action commenced by the common and ordinary mode of process. The mode of service in the common process is provided for by the act of 1797, ch. 50, already cited. In cases of attachment, a summons is required to be left at the "*dwelling-house or place of last and usual abode*" of the defendant, and "in case the defendant was at no time an inhabitant or resident within this commonwealth, then such summons to be left with his or her tenant, agent or attorney. It appears to me that the plain intent of the statute is to apply the words of the first clause exclusively to cases where the defendant was at the time of the suit an inhabitant or resident of the commonwealth, having a *dwelling-house or place of last and usual abode therein*. Where a defendant has no such inhabitancy or residence, but has left the commonwealth, and changed his domicile, how can it be said that he has a dwelling-house there, or a place of *last and usual abode*? These words "*last*" and "*usual*" (not *last or usual*) refer to cases where the party has had several residences within the commonwealth.

To make the service good, the last residence, if it be the usual residence of the party, is the proper place at which the summons is to be left. If the party has no place of *usual* abode in the commonwealth at the time, the statute has not made the service at the place of his *last* abode sufficient. Both must concur. And there is sound reason in this provision; for otherwise it might happen that if the party were at one time an inhabitant, and afterwards should change his domicile, and become a citizen of another state, or have his home and usual and constant place of abode abroad for any length of time whatsoever, his property might be attached here, and, without any notice to him or to any agent or attorney, a judgment might be obtained against him, binding the property attached forever. So monstrous and mischievous a provision could hardly be deemed a just exercise of legislative power in any civilized country. The second clause applies wholly in terms to defendants who have been *at no time* inhabitants or residents within the commonwealth. Now the writ itself negatives the presumption that Swan is in this predicament. It describes him as now commorant at Paris, but *of the city of Boston*; so that his inhabitancy or residence at some time, in the commonwealth, is distinctly averred. The return of the marshal states that such inhabitancy has not been within three years. So that the case before the court is of a defendant who has once been an inhabitant, and for three years last past has ceased to be an inhabitant. No mode of service is provided for in such a case by the statute of 1797, chapter 50; and the trustees having been discharged, it is not provided for by the act of 1794, chapter 65. It is a *casus omissus*. In respect to the service of process in such a new and extraordinary manner, varying so much from the principles and practice of the common law, and in many instances so little consonant to the principles of public law or general justice, there can be no ground to extend the statute provision by implication or equity. The state court itself has not so construed them; and in the cases of *Tingley v. Bateman*, 10 Mass., 344; *Lawrence v. Smith*, 5 Mass., 362; and *Gardner v. Barker*, 12 Mass., 36, has been disposed rather to narrow down than widen the means by which non-residents are to be brought within the sphere of our process. It appears to me, therefore, that as the service of the summons on an *agent* is not authorized, except where the defendant has at no time been an inhabitant or resident, such service is void; and as no summons was in fact left at any place of abode of the defendant, either last or usual, in the commonwealth, there has been no compliance with the other branch of the statute. Either way, therefore, the service is, according to the local laws, defective and nugatory.

§ 876. *The circuit court has no jurisdiction of a suit by an alien against one described merely as a citizen of the United States.*

There is another defect in the description of the writ, which would be fatal if every other were surmounted. Swan is not described to be a citizen of Massachusetts or of any particular state, but only as "*a citizen of the United States.*" Now, such a specific description is, according to the known course of decisions, indispensable to give the circuit courts jurisdiction. Although the judiciary act of 1789 has given to the circuit courts jurisdiction of causes where "*an alien is a party,*" yet this must be construed and controlled by the provisions of the constitution itself. The latter does not extend the judicial power of the United States to such an extent, but limits it to controversies between *citizens of a state* and *foreign citizens or subjects*. Hence the uniform interpretation of the act of 1789 has been, that if an alien is one party, a citizen of some particular state must be the other party. The constitution does not recognize such a

description of persons as "citizens of the United States," as the objects of its judicial power. The circuit courts have no jurisdiction of suits between aliens, or between persons having no other description than "citizens of the United States." A citizen of one of our territories is a citizen of the United States; but he is not by law entitled to sue or be sued in the circuit courts of the United States. This doctrine was settled at an early period in the circuit courts, as appears from the case of *Irving v. Frazier*, Story's Plead., 9, and other cases cited in the note to *Rea v. Hayden*, 3 Mass., 24, 25, and has been affirmed in the supreme court in *Hepburn v. Ellzey*, 2 Cranch, 445 (§ 901, *infra*), and *Montalet v. Murray*, 4 Cranch, 46.

Upon the whole, in every view which I have been able to take of the present case, it is the duty of the court to stay further proceedings upon the ground that there has been no sufficient service of the process to compel the appearance of Swan or authorize a judgment of default against him.

BONNAFEE *v.* WILLIAMS.

(3 Howard, 574-577. 1844.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a writ of error from the southern district of Mississippi. The plaintiffs brought their action on four promissory notes, payable at different times, for different sums, and bearing different dates, except two, which were dated the 23d January, 1839. In each of the notes the defendants promised, or either of them, to pay to Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds county, at their banking house in Clinton, the sum named, without defalcation, for value received.

The defendants demurred to the declaration, and assigned the following causes of demurrer: 1. "The plaintiffs cannot maintain the action, because, by their own showing, the defendants who are sued are also a part of the persons for whose use the suit is commenced." 2. "The court can have no jurisdiction of this case, because, although it is true the nominal plaintiffs are the bearers of the paper sued on, and citizens of a state other than Mississippi, yet those for whose benefit suit is brought, for anything which appears in the declaration, are citizens of the state of Mississippi."

§ 877. *Jurisdiction is controlled by the citizenship of the holders of the legal right to sue.*

The notes in question passed by delivery, and the plaintiffs, as bearers, have a right to sue in their own names, as the promise to pay is made to bearer. The plaintiffs allege that they are citizens of New York, and consequently the circuit court had jurisdiction of the case. Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue, at law, in the federal courts, without reference to the citizenship of those who may have the equitable interest. *Irvine v. Lowry*, 14 Pet., 298 (§§ 1207-1209, *infra*). The judgment of the circuit court, which sustained the demurrer, is reversed, and the cause is remanded for further proceedings.

McNUTT v. BLAND.

(2 Howard, 9-28. 1844.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

STATEMENT OF FACTS.—Action of debt on a sheriff's bond. The bond, in conformity with the law of the state, was to the governor, and the suit was in the name of the governor for the use of Leggett. The breach assigned was the improper discharge by Bland, as sheriff, of a prisoner committed to his custody by the United States marshal on an execution from a federal court. The defenses were: 1. That the discharge was in conformity to a state statute, for non-payment by the creditors of the prison fees; and 2, that the prisoner was regularly discharged according to the state laws for the relief of insolvent debtors. The plaintiff replied to the first of these pleas, that no notice of the discharge was given to his agent, who resided in Mississippi; and to the second, that the imprisonment was upon an execution from a federal court and the discharge was not in pursuance of any act of congress.

Opinion by MR. JUSTICE BALDWIN.

As the judgment below was rendered on a general demurrer, it is necessary to ascertain in what part of the pleadings the first demurrable defect occurred, which the defendant here alleges was in the declaration, inasmuch as it appears that the plaintiffs and defendants were citizens of Mississippi, and consequently the court below had not jurisdiction of the case. By the law of that state (How. & Hut., 290, 291), all sheriffs must give a bond to the governor of the state for the time being, and his successors, conditioned for the faithful performance of the duties of his office; which bond may be put in suit and prosecuted from time to time at the costs and charges of any party injured, until the whole amount of the penalty thereof be recovered. This suit was accordingly brought in the name of the governor, for the use of Leggett, Smith and Lawrence, citizens of New York.

§ 878. *Where an official bond by law runs to the governor, the circuit court has jurisdiction of a suit thereon brought in his name, to the use of parties who are citizens of another state.*

The parties in interest, therefore, had a right to sue the defendants in the circuit court in their own names, by a bill in equity in an appropriate use, or by an action of debt, or for an escape against the sheriff himself, as in *Darst v. Duncan*, 1 How., 301, if he made out a cause of action in either form, and we can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the governor, who is a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a circuit court of the United States, in any other mode of proceeding than on the sheriff's bond.

It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriffs' bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the governor for the use of plaintiffs in *mesne* or final process, who are in law and equity the beneficiary obligees; we think

this defect does not exist. The constitution extends the judicial power to controversies between citizens of different states; the eleventh section of the judiciary act gives jurisdiction to the circuit courts of suits between a citizen of the state where the suit is brought and a citizen of another state. In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the constitution or law can he be considered as a litigant party; both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law.

This court must have acted on these principles in *Browne v. Strode*, 5 Cr., 303, which was a suit on an administration bond of an executor, for the faithful execution of the testator's will in conformity with a law of Virginia (5 Hen. St., 461), which requires all such bonds to be payable to the justices of the county court where administration is granted, but may be put in suit and prosecuted by and at the costs of the party injured. The object of that suit was to recover a debt due by the testator to a British subject; the defendant was a citizen of Virginia; the persons named in the declaration as plaintiffs were the justices of the county, who were also citizens of Virginia, yet it was held that the circuit court of that state had jurisdiction. We are aware of no subsequent decision of this court which in the least impairs the authority of that case, or contravenes the principle on which it was decided; that where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.

Executors and administrators are not in this position — they are the actors in suits brought by them; the personal property of the decedent is vested in them; the persons to whom they are accountable, for whose benefit they act, can bring no suit to assert their rights against third persons, be the cause of action what it may; nor can they interfere with the conducting of the suit to assert their rights to the property of the decedent which do not vest in them. The personal representative is, therefore, the real party in interest before the court (12 Pet., 171), and succeeds to all the rights of those they represent by operation of law, and no other persons are capable, as representatives of the personalty, of suing or being sued. They are contradistinguished, therefore, from assignees who claim by the act of the parties, and may sue in the federal courts in cases where the decedent could not. 8 Wheat., 668; 4 Cranch, 308, S. P. By the eleventh section of the judiciary act assignees cannot sue where the assignor could not, nor can they sue in their own names if the assignor could, unless the assignees were aliens or citizens of another state than that of the defendant, and the instrument sued on was so assigned as to vest the right of action in the assignees, in which latter case the suit must be by the party originally entitled to sue. Thus, where the payee of a promissory note, which was neither negotiable nor assignable, so as to sustain an action by the assignees, sued for the use of a corporation incapable of suing in the federal courts, this court held that the circuit court had jurisdiction, on the ground that the suit was on a contract between the plaintiff and defendant. The legal right of acting being in the plaintiff, it mattered not for whose use the

suit was brought, the parties being citizens of different states. *Irvine v. Lowry*, 14 Pet., 298 (§§ 1207–1209, *infra*). In that case, the decision in 5 Cranch was reviewed and affirmed; and as it is in all respects analogous to, it must govern this and similar cases, where the cause of action is not founded on a contract between the parties or their legal representatives. The objection to the jurisdiction cannot, therefore, be sustained.

§ 879. *The Mississippi act of June 22, 1822, does not authorize the sheriff to discharge a prisoner from custody otherwise than in accordance with the laws of the United States.*

The next question arises on the defendants' first plea in bar, which sets up a discharge of the prisoner by the sheriff, in default of the plaintiff in the execution paying the prison fees due, pursuant to the act of 22d June, 1822, §§ 35, 47. *Hut. & How.*, 640–644. This law, by its own force, cannot apply to persons committed on executions from the courts of the United States; it must first be adopted by act of congress, or some rule of court under the authority conferred on the courts of the United States by law. It is a peculiar municipal regulation, applicable and intended to apply only to persons committed under state process, as clearly appears by the sixty-second section of the same law, in the revised code, as to process of the United States. *How. & Hut.*, 649, 650. After reciting in full the resolution of congress relating to jails, passed in 1789 (1 Story, 70), it proceeds: "And whereas it is just and reasonable to aid the United States therein, on the terms aforesaid, until other provisions shall be made in the premises, it is enacted, That all sheriffs, etc., within this state, to whom any person or persons shall be sent or committed by virtue of legal process, issued by or under the authority of the United States, shall be, and are hereby, required to receive such prisoners into custody, and to keep the same safely until they shall be discharged by due course of law, and be liable to the same pains and penalties, and the parties aggrieved be entitled to the same remedies, as if such prisoners had been committed under the authority of the state. The sheriff may require of the marshal the fulfillment of the proposals of the general government, with regard to rent and sustenance, at least quarter yearly; and on the discharge of the prisoner shall make a statement of charges, etc., to enable him to make his return to the proper department of the general government."

Taking this section of the law in connection with the resolution of 1789, there appears an evident intention in the legislature that the law should cover the whole resolution, so as to carry it into effect in all its parts and provisions. Hence the terms in each must be made to harmonize; whereby the phrase in the sixty-second section, "and to keep the same safely until they shall be discharged by due course of law," will be referred to the corresponding phrase in the resolution, "until they shall be discharged by due course of the law thereof" (the United States), so as to authorize no discharge by virtue of any state law, incompatible with the resolution. If any doubt could arise on these words in the resolution, "all prisoners committed under the authority of the United States," whether they applied to cases between individuals, it is removed by the explicit language of the law, "any person or persons who shall be sent or committed by virtue of legal process, issued by or under the authority of the United States," etc., "and the parties aggrieved shall be entitled to the same remedies," etc., which necessarily embrace all cases, civil or criminal.

As it would be wholly inconsistent with this view of the resolution and law for the legislature to authorize the sheriff to discharge any person from cus-

tody, otherwise than by the due course of the laws of the United States, we cannot attribute such an intention to them, unless the words of their act clearly indicate it; but there is nothing in the act to that effect, or any words which admit of such construction. On the contrary, as the resolution of congress positively requires it, as the preamble to the state law declares it to be "just and reasonable to aid the United States therein," the enacting part must be taken accordingly, otherwise the law would conflict with the resolution.

§ 880. *No discharge of a prisoner of the United States under a state law not adopted by congress or by a rule of court will exonerate the officer in charge.*

The act of congress passed in 1800 (2 Stats. at Large, 4) provides for the mode of discharging insolvent debtors, committed under process from the courts of the United States, and the cases in which it may be done; it is obligatory on the sheriffs in every county of the states who have acceded to the resolution of 1789, and no discharge under any state law not adopted by congress, or a rule of court, can exonerate the officer. *Vide* 1 Story, 715; 3 Story, 1932 (4 id., 1), 1939 (id., 119); *Suydam v. Broadnax*, 14 Pet., 75; 10 Wheat., 36, 37. From the time of *Palmer v. Allen*, 7 Cranch, 554, to *Duncan v. Darst*, 1 How., 301, the language and decisions of this court have been uniform for more than forty years, that a state law, which is "a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint on state officers in the execution of the process of their courts, is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them. By the process acts of 1789 (1 id., 93), 1792 (id., 275), and 1828 (4 id., 278), congress have adopted such state laws as prescribe the modes of process and proceedings in suits at common law, as are not in conflict with the laws of the United States, which can be executed by the courts of the United States; which impose no restraint on or obstruction of their process from its inception till ultimate satisfaction from the defendant, or the marshal, sheriff, or other officer, intrusted with its execution." 2 Pet., 525; 10 Wheat., 40, 56, etc. "Congress, however, did not intend to defeat the execution of judgments rendered in the courts of the United States, but meant they should have full effect by force of the state laws adopted, and therefore all state laws regulating proceedings affecting insolvent persons," or that are addressed to state courts or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. 1 How., 306; 14 Pet., 74, S. P. For these reasons we are of opinion that the defendants' first plea is defective, in not setting forth a case which justifies the discharge of the person committed on the execution.

The second plea sets up a discharge of the prisoner pursuant to the laws of Mississippi, as an insolvent debtor, by order of a judge of probate, which presents a case covered by the decision of this court in *Duncan v. Darst*, that such a discharge by a sheriff was no defense to an action of debt for an escape. 1 How., 304. The judgment of the court below must therefore be reversed, and judgment rendered for the plaintiff.

Dissenting opinion by MR. JUSTICE DANIEL.

From the opinion just pronounced on the part of the court in this cause, I am constrained to differ. Although it ever must be with unaffected diffidence that I shall find myself opposed to a majority of my brethren, still, a feeling

like that just adverted to should not, and properly cannot, induce in me a relinquishment of conclusions formed from examinations carefully made, and upon decisions which appear to be distinctly, as they have been repeatedly, announced. My opinion is that the judgment of the circuit court against the plaintiff below ought to be affirmed, for the reason that the court could not properly take cognizance of his cause. Under systems of polity compounded as are the federal and state governments of this Union, instances of conflicting power and jurisdiction, real or apparent, will frequently arise, and will sometimes run into niceties calculated to perplex the most astute and practiced expositors. For myself, I must believe that the surest preventive of such instances, their safest and most effectual remedy when they shall occur, will be found in an adherence to limits which language in its generally received acceptation prescribes, and in shunning not merely that which such acceptation may palpably forbid, but, as far as possible, whatever is ambiguous or artificial. In adopting or commending the rule thus indicated, I undertake to propound no new principle of construction to this court, to essay no innovation upon its doctrines. I plant myself, on the contrary, upon its oft-repeated decisions, and invoke their protection for the interpretation now insisted upon.

The action in the circuit court was instituted in the name of Alexander McNutt, governor of the state of Mississippi (who was the successor of Charles Lynch), who sues for the use of Thomas Leggett and others, citizens of the state of New York, against Bland, Humphreys and Geissen, citizens of the state of Mississippi. It was founded on a bond executed by Bland, a sheriff of the county of Claiborne, in the state above mentioned. The pleadings, so far as they relate to the conduct of the sheriff in fulfillment of his duties, or in dereliction thereof, are irrelevant to the question here raised, and need not, therefore, be examined. The proper question for consideration here is this: whether, upon the case as presented upon the declaration, the circuit court of Mississippi could take jurisdiction. McNutt is the party plaintiff upon the record, in whom is the legal right of action. Leggett and others, who are said to be the beneficiaries in the suit, and in whom is the equitable interest, are not the legal parties to the suit at law, and could not maintain an action upon the bond to which they were not parties.

Is McNutt to be considered as suing in his private individual character, and the addition, "governor of the state of Mississippi," to be regarded as merely a phrase of description? Or is he to be viewed as the representative of the state of Mississippi, or rather as identified with the sovereignty of that state, and having vested in him the exercise of her executive authority? Let both branches of this inquiry be cursorily pursued. If McNutt is to be regarded as a private party to the action, whether in his own interest, or as the private agent of the state for certain purposes, it would indeed seem to be too late, and entirely supererogatory, to construct an argument to prove that, to warrant either the commencement or prosecution of a suit in his name in a circuit court of the United States, his citizenship must be averred and shown upon the record. Decisions to this effect may be said to have been piled upon the question, for they may be traced from a period coeval almost with the passage of the judicial act, down to a comparatively recent day; ranging through at least ten volumes of the decisions of this court; and ruling, it is believed without an exception, that wherever jurisdiction is to be claimed from the citizenship or alienage of parties, such citizenship or alienage must be expressly set forth;

ruling, moreover, that wherever jurisdiction is claimed from the character of parties, it must be understood as meaning the parties to the record.

The first case in support of these positions is that of *Bingham v. Cabot*, 3 Dal., 382, instituted in 1797, in which the plaintiffs were styled in narrative as John Cabot (with the co-plaintiffs), described as being "all of our said district of Massachusetts," and as complaining that "said William, at Boston, being indebted," etc. Lee, attorney-general, insisted "that there was not a sufficient allegation in the record of the citizenship of the parties to maintain the jurisdiction of the circuit court, which is of limited jurisdiction." Dexter, on the other hand, urged "that stating in the declaration the party to be of a particular place designates his home, and of course his citizenship." The court was clearly of opinion "that it was necessary to set forth the citizenship (or alienage where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the circuit court." In the year 1797 were decided in the supreme court the cases of *Turner v. Enrille*, 4 Dal., 7, and *Turner v. The Bank of North America*, 4 Dal., 8 (§ 1098, *infra*). The declaration in the former case set out a demand by the Marquis de Casa Enrille, of —, in the island of —, against Stanley and the intestate of Turner and Greene, merchants and partners at Newbern in the said district. Upon objection to the jurisdiction for want of a proper description of parties — By the court: "The decision in the case of *Bingham v. Cabot et al.* must govern the present case; let the judgment be reversed, with costs." *Turner, Administrator of Stanley, v. The Bank of North America*, was an action upon a promissory note drawn at Philadelphia by Stanley, indorsed by Biddle & Company to the Bank of North America. The narrative stated that the president and directors were citizens of the state of Pennsylvania; that Turner, the administrator, and Stanley, the intestate, were citizens of the state of North Carolina; but of Biddle & Company, the payers and indorsers, there was no other description than "that they used trade and merchandise at Philadelphia or North Carolina." Ellsworth, chief justice, in delivering the opinion of the court, after remarking that the Bank of North America, as well as the drawer of the note, was properly described, proceeds thus: "The error assigned is, that it does not appear from the record that Biddle & Company, the promisees, or any of them, are citizens of a state other than that of North Carolina. The circuit court, though an inferior court, in the language of the constitution, is not so in the language of the common law. A circuit court, however, is of limited jurisdiction, and has cognizance not of cases generally, but only of a few specially circumstanced; and a fair presumption is, not (as with regard to a court of general jurisdiction) that a cause is within its jurisdiction, unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears. This renders it necessary to set forth, upon the record of a circuit court, the facts and circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant is a citizen of one state, to show that the plaintiff is a citizen of some other state or an alien. Here the description of the promisee only is, that he used trade at Philadelphia or North Carolina, which contains no averment that he was a citizen of a state other than North Carolina, or an alien. We must, therefore, say there was error." In *Mossman v. Higginson*, 4 Dal., 14, the same doctrine is affirmed, and the court conclude their opinion with the following explicit language: "Neither the constitution

nor the act of congress regards, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description." The case of *Course v. Stead*, 4 Dal., 22, is marked by one trait which peculiarly illustrates and enforces the principle ruled in the cases previously cited. In this last case, a supplemental bill was filed making a new party to a suit previously pending, but in the supplemental bill no description of the citizenship of this new defendant was given; the absence of such description having been assigned for error, it was contended that such a description was not necessary in the supplemental suit, which is merely an incident of the original bill brought in the same court; but the supreme court sustained the objection, and reversed the decree of the circuit court, on the ground of jurisdiction. Next in the order of time is the case of *Wood v. Wagon*, 2 Cranch, 9, where the statement in the pleadings was, that Wagon, a citizen of Pennsylvania, sheweth that James Wood, of Georgia, etc. The judgment was reversed for the defect that the plaintiff and defendant were not shown by the pleadings to be citizens of different states.

In *Hepburn v. Ellzey*, 2 Cranch, 445 (§ 901, *infra*), the decision turned upon a defect in the description of a party necessary to give jurisdiction. *Winchester v. Jackson*, 3 Cranch, 514. The writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different states. In *Kempe v. Kennedy*, 5 Cranch, 185 (§§ 508, 509, *supra*), this court declare that "the courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them." The same in effect, the same indeed in terms, is the decision of this court in *Montalet v. Murray*, 4 Cranch, 46. Again, the principle that the character which authorizes access to the circuit court must be apparent upon the record is strikingly exemplified in *Chappedelaine v. Dechenaux*, 4 Cranch, 306. In this case the plaintiffs were trustees, not suing in their own interest; yet, as they were aliens, and, as such, entitled to sue in the circuit courts of the United States, this court, in virtue of that character, and their title flowing therefrom apparent on the record, sustained the jurisdiction of the circuit court. Passing, with a mere mention of them, the cases of *The Hope Insurance Company v. Boardman*, 5 Cranch, 57; *Hodgson v. Bowerbank*, 5 Cranch, 303; *Skillern v. May*, 6 Cranch, 267; *The Corporation of New Orleans v. Winter*, 1 Wheat., 91, all full to the point, I will quote an emphatic and more comprehensive affirmation of Judge Washington in reference to the powers of the circuit courts, expressed in the opinion of that judge in *McCormick v. Sullivan*, 10 Wheat., 199. "They are all (says he) of limited jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause." But the fullest and clearest exposition and vindication of the doctrine contended for in this opinion will be found in the reasoning of Chief Justice Marshall, in delivering the decision in the case of *Osborn v. The Bank of the United States*. The portion of the reasoning particularly referred to commences on the eight hundred and fifty-sixth page of the ninth volume of Wheaton. "The judicial power of the Union," says the chief justice, "is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or

against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that the jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record." Again he remarks, p. 857: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record." (See CONST., §§ 2363-87.)

This reasoning of the late chief justice seems to meet the present case in every aspect of which it is susceptible, and to dispel every shade of doubt that could possibly be cast upon it. The doctrine this reasoning so well sustains is reaffirmed by the same judge, in the still later case of *The Governor of Georgia v. Madrazo*, 1 Pet., 122; and amongst other authorities there cited, the principles ruled as above mentioned in *Osborn v. The Bank of the United States* are referred to and approved. *Vide*, also, *Keary v. The Farmers' and Mechanics' Bank of Memphis*, 16 Pet., 89.

Alexander McNutt, in the case under examination, must be regarded as a private person acting in a private capacity; at most, as a mere agent under a law of Mississippi, in whom the interests of other individuals may to a particular extent have been vested, and through whom they were authorized to sue. He represented or was identified with no political or fiscal rights or interests of the state of Mississippi. That state had no interest involved in the conducting of that suit by McNutt, and much less was she a party to the record in that suit. Standing then in the relation of a mere agent in the transaction, and there being no law of the United States investing the federal courts with jurisdiction as incident to such agency, he could have access to those courts, and the courts themselves could have jurisdiction, solely in virtue of his character of citizen of a state different from that in which the defendants resided, and that character it was indispensable should appear upon the record. These are positions which it has seemed to me impossible successfully to assail; positions encompassed with a chain of authorities comprehending the entire existence and duration of the government itself. This, however, is said to have been broken by the act of this court, and by that act an opening made for further power and jurisdiction in the circuit courts. The means by which such important consequences are supposed to have been effected is the decision of the case of *Browne v. Strode*, 5 Cranch, 303. In this case, which was submitted without argument, and in which the certificate directed to the circuit court is comprised in two lines, no reason whatever is assigned for the conclusion at which the court appear to have arrived. The facts of the case, as presented in the short abstract of it, are thus stated: "It was an action

upon an executor's bond given in conformity with the laws of Virginia. The object of the suit was to recover a debt due from the testator in his life-time to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs were the justices of the peace for the county of Stafford, and were all citizens of Virginia." The court ordered it to be certified as their opinion "that the court below has jurisdiction in the case." This is the whole case, and it is confidently believed to stand entirely solitary; without support, and without a likeness in the whole history of our jurisprudence; and, in commenting upon this case, it may be safely asserted that if the court in their certificate have intended to affirm that the holders of equitable interests, *cestui que trusts*, who are not the holders of the legal interests or rights of action at law, are in actions at law the regular and proper parties to the record, then, indeed, they have not merely overturned the series of decisions in this court, from the case of *Bingham v. Cabot*, in 3 Dal., 382, decided in 1798, down to the case of *The Governor of Georgia v. Madrazo*, 1 Pet., 110; they have reversed, moreover, what is believed has been regarded as a canon of the law, wherever the principles of the common law have been adopted; and this they have accomplished by one short sentence, and without a single word to explain this mighty revolution. But can it be reasonably presumed that this court have in so cursory a mode intended to reverse its own well-considered, well-reasoned and oft-repeated decisions; and this, too, without professing to review them — nay, without one word of reference to them of any kind? A presumption like this seems scarcely compatible with that cautious reluctance with which innovation on settled principles is always admitted by the courts. Is it not far more probable that the short and isolated abstract in question exhibits an imperfect picture of the action and purposes of the court as applicable to some particular state of case which may not be fully and accurately given, for the record of the case in the court below is not set out *in extenso*. But let it be supposed that the objects and the language of the court, in the case of *Browne v. Strode*, are accurately given, still, the inquiry recurs, does that case establish the law of this cause at the present day? *Browne v. Strode* was decided in 1809. Turning, for the moment, from the decisions of this court prior to 1809, supposed (strong and explicit, and numerous as they are) to have been silently demolished by *Browne v. Strode*, 5 Cranch, 303, what must be understood with respect to the decisions of *Skillern v. May*, 6 Cranch, 267; of *Osborn v. The Bank of the United States*, 9 Wheat., 738; of *McCormick v. Sullivant*, 10 Wheat., 199, and of *The Governor of Georgia v. Madrazo*, 1 Pet., 110, all posterior in date to 1809? If these cases are to be received upon the import solely of their own terms, uninfluenced by any reference to prior decisions, still, as they are posterior in time to *Browne v. Strode*, and are wholly irreconcilable therewith, they should be understood as controlling and reversing that decision. How much stronger, then, nay, how irresistible, appears this conclusion, when it is ascertained that the several decisions subsequent to 1809 refer expressly to those of previous date, rely upon them as forming their own foundation, and reaffirm them as the law of the federal courts.

The only decision in this court which would appear, upon a superficial view of it, to give color to the decision of *Browne v. Strode*, is the case of *Irvine v. Lowry*, reported in 14 Pet., 293 (§§ 1207–1209, *infra*). An attentive examination of the latter case, however, will show that, so far from resembling *Browne*

v. Strode, the facts of the two cases differ essentially, and that the former does not sustain, but, in effect, contradicts the latter. In *Irvine v. Lowry* the action was in the name of Irvine, the payee of the note, for the benefit of the Lumberman's Bank. On behalf of Lowry, the defendant, exception was taken to the jurisdiction upon the ground that the Lumberman's Bank, the beneficiaries in the suit, consisted, in part, of persons who were citizens of the same state to which the defendant belonged. The case of *Browne v. Strode* was relied on to show that these beneficiaries, and not the nominal parties or those who held the legal interest, should be considered the true parties on the record. This exception was overruled, and the jurisdiction sustained in the name of the party holding the legal right, in conformity with the current of authorities before cited. 'Tis true that, in the opinion delivered in this case, the decision in *Browne v. Strode* is mentioned, and accounted for upon an hypothesis which by no means divests it of its anomalous character, any more than it rests the case of *Irvine v. Lowry* upon any real similitude with it. The argument is this: that although in *Browne v. Strode* the plaintiffs and defendant were citizens of the same state, yet the statute of Virginia, which requires the executor's bond for the protection of creditors and legatees, passes the legal right to those whose interests the bond is designed to protect. To this reasoning several answers at once present themselves, either of which appears to be sufficient. 1. If this could be so understood, it would leave the objection precisely where it stood before. The parties to the action would still be all citizens of the same state, whereas the judicial act declares they shall be (that is, the plaintiffs and defendants) of different states. 2. The Virginia statute professes to effect no such transmutation of legal rights. 3. It confers no right of action on the beneficiaries under the bond. 4. It orders the prosecution of the suit in the names of the justices, the obligees, and, by consequence, forbids such proceeding in the names of any other persons. 5. In point of fact, in the case commented on (as doubtless would be found to be the fact in every suit ever instituted under the statute), the action was brought in the names of the justices, so that those whose interests were designed to be protected by the bond were never parties to the suit at all, much less the real or only parties representing the right of action under the bond.

My mind, then, is impelled by considerations like these to the deductions that *Browne v. Strode*, 5 Cranch, 303, does not furnish the rule for the decision of this cause; and that, if it ever was a rule for the federal courts, it has been clearly and emphatically annulled. As a corollary from the above reasoning and the cases adduced in support thereof, it follows that Alexander McNutt, without appearing as the party plaintiff upon the record to be a citizen of some state other than that to which the defendants belong, could have no standing in the circuit court; and that failing so to appear, the circuit court could have no jurisdiction over the cause.

It cannot be requisite here to meet any argument, should any be attempted, designed to maintain the right of McNutt to sue in virtue of his character of governor of Mississippi, and as such, representing the sovereign or supreme executive power of that state. In that aspect, the suit would be virtually by the state herself, and not be the suit of Alexander McNutt; such a suit, too, could take place only where some direct right or interest of the state should be involved. Of such a controversy the circuit court could unquestionably have no jurisdiction; this having been settled as one of those instances, the cognizance

whereof belongs exclusively to the supreme court. *Vide* The State of Georgia v. Brailsford, 2 Dal., 402, and The Governor of Georgia v. Madrazo, 1 Pet., 110; Fowler v. Lindsey, 3 Dal., 411 (§§ 757–759, *supra*).

To any argument *ab inconvenienti*, which may be urged in support of the jurisdiction in this case, I would simply oppose the observations of two distinguished members of this bench, in reply to a similar argument addressed to them in the case of Turner v. The Bank of North America, 4 Dal., 10 (§ 1098, *infra*); in which Chief Justice Ellsworth inquired: “How far is it intended to carry this argument? Will it be affirmed that, in every case to which the judicial power of the United States extends, the federal courts may exercise jurisdiction without the intervention of the legislature to distribute and regulate the power?” And Chase, J., remarked: “If congress has given the power to this court, we possess it, not otherwise; and, if congress has not given the power to this or any other court, it still remains at the legislative disposal.” *Est boni judicis ampliare jurisdictionem* was once quoted as a wise judicial maxim; how far this may accord with systems differently constituted from ours, and having their foundations in a large and almost undefinable discretion, it is, perhaps, unnecessary here to inquire; it seems, however, scarcely compatible with institutions under which the political and civil state is referred, almost exclusively, to legislative or express regulation.

Upon the views above given, I conclude that the judgment of the circuit court should be affirmed.

STRAWBRIDGE v. CURTISS.

(3 Cranch, 267, 268. 1806.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Some of the complainants in this case, and all the defendants except Curtiss, were alleged to be citizens of Massachusetts. It was alleged that Curtiss was a citizen of Vermont. The bill was dismissed in the lower court for want of jurisdiction.

§ 881. *Where the interest of the several parties is joint, each must be competent to sue or be sued in the federal courts.* (See § 882, *infra*.)

Opinion by MARSHALL, C. J.

The court has considered this case, and is of opinion that the jurisdiction cannot be supported. The words of the act of congress are, “where an alien is a party; or the suit is between a citizen of a state where the suit is brought and a citizen of another state.” 1 Stats. at Large, 78.

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts. But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.

CLEARWATER v. MEREDITH.

(21 Howard, 489-493. 1858.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Indiana. The plaintiff, who is averred to be a citizen of the state of Ohio, brought his action against Solomon Meredith and Thomas Tyner, citizens of Indiana, on the 12th of July, 1853, together with Caleb B. Smith, who, at the time of the commencement of this suit, was not a citizen of the state of Indiana, and is therefore not joined as a defendant herein, etc.

The declaration has three counts, one of which contains the following guaranty:

“Whereas Hiram Clearwater, of the city of Cincinnati, on the 6th of May, 1853, contracted with the Cincinnati, Cambridge & Chicago Short Line Railway Company for the sale of a tract of land situate in Wayne county, Indiana, lying on the national road, about four miles east of Cambridge city, and adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the consideration of \$10,000, to be paid in the capital stock of said company at par; and whereas, in such contract of sale it was agreed that said company should furnish to said Clearwater a guaranty that the capital stock of said railway company should be at par within one year from the completion of the entire line of said road: Now, in consideration that the said H. Clearwater has, with the consent of the said company, and at our request, executed a deed of conveyance to Solomon Meredith for said land, to whom the same has been sold by the said company, we, the undersigned, hereby guaranty that the said stock of said company, which has been issued to said Clearwater in pursuance of said contract, shall be worth par in the city of Cincinnati within one year from the time the said railroad shall be completed from Cincinnati to Newcastle, Indiana, and that said road shall be completed within two years from the 1st day of October, 1853, and signed by Pleasant Johnson, S. Meredith, Caleb B. Smith and Thomas Tyner.”

The defendants, by counsel, come and say the declaration of the said plaintiff and the counts therein contained are severally insufficient in law to enable said plaintiff to have and maintain his action against said defendants; and for cause of demurrer show to the court the following: 1. The jurisdiction of the court is not shown by proper averment. 2. No consideration is shown for the undertaking. 3. The several counts do not contain facts sufficient to constitute a cause of action; wherefore the defendants pray judgment, etc.

If this be regarded as a plea to the jurisdiction of the court, it is argued that the suit is brought on a joint contract executed by the defendants in error, when only two of them were served with process, and the third one, Caleb B. Smith, who, at the time of the commencement of the suit, was not a citizen of the state of Indiana, and is therefore not joined as a defendant herein, etc.

§ 882. *The act of February 28, 1839, so far changed the character of parties to a suit as to allow a suit against some defendants though they were jointly bound with others beyond the jurisdiction of the court. (See § 885, infra.)*

The first section of the act of February 28, 1839, provides that “where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not

voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer." In the case of *The Railroad Bank of Vicksburg v. Slocomb*, 14 Pet., 65, it is said the eleventh section of the judiciary act declares that no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.

It has been held that this is a personal privilege of not being sued out of the district in which the defendant may live or in which he shall be found on serving the writ, and that it may be waived by the defendant. And it is said, in the above opinion, "that it did not contemplate a change in the jurisdiction of the courts, as it regards the character of the parties, as prescribed by the judiciary act and expounded by this court—that is, that each of the plaintiffs must be capable of suing and each of the defendants capable of being sued; which is not the case in this suit, some of the defendants being citizens of the same state with the plaintiffs." It is well known that the act of 1839 was intended so to modify the jurisdiction of the circuit court as to make it more practical and effective. Where one or more of the defendants sued were citizens of the state, and were jointly bound with those who were citizens of other states and who did not voluntarily appear, the plaintiff had a right to prosecute his suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process or who do not voluntarily appear.

Now, it is too clear for controversy, that the act of 1839 did intend to change the character of the parties to the suit. The plaintiff may sue in the circuit court any part of the defendants, although others may be jointly bound by the contract who are citizens of other states. The defendants who are citizens of other states are not prejudiced by this procedure, but those on whom process has been served and who are made amenable to the jurisdiction of the court. And in regard to those whose rights are in no respect affected by the judgment or decree, it can be of no importance of what states they are citizens. If one of the defendants should be a citizen of the same state with the plaintiff, no jurisdiction could be exercised as between them and no prejudice to the rights of either could be done.

The plea to the jurisdiction seems not to be well taken and it cannot be sustained. In the case of *Hill v. Smith and others*, decided at the present term (21 How., 283; *CONTRACTS*, § 564), this court held that the demurrer filed to the counts on the guaranty did not bring up the validity of that instrument for the action of the court, and that it must be specially pleaded with suitable averments. And the court reversed the judgment and remanded it to the circuit court, with leave, on the payment of costs, to move to amend the pleadings, so as to raise the questions on the guaranty. The same order is made in the present case. Judgment reversed.

JONES *v.* ANDREWS.

(10 Wallace, 327-334. 1870.)

APPEAL from U. S. Circuit Court, Western District of Tennessee.

STATEMENT OF FACTS.— Andrews leased a hotel in Memphis to Reed & Bryson, taking their notes for the rent. These sublet to Jones, taking his notes for the rent. The rent not being paid, Andrews, in the absence of Jones, took possession of the hotel, and recovered judgment in the court below against Reed & Bryson on their notes, and garnished the notes of Jones. Jones then filed a bill in the same court for an injunction, describing the citizenship of the parties in the caption and in the prayer, averring Andrews to be a citizen of New York and Reed & Bryson to be residents of Tennessee. Andrews was not served with process, but came in and moved that the bill be dismissed for want of jurisdiction and for want of equity.

Opinion by MR. JUSTICE BRADLEY.

On the question of jurisdiction over the parties, the appellees contend: 1st. That the citizenship of the parties was not sufficiently alleged in the bill. 2d. That, if sufficiently alleged, the court had no jurisdiction over Andrews, the principal defendant, who was a citizen of New York, and not a citizen of Tennessee, where the suit was brought.

§ 883. *The allegation of citizenship is sufficient if it fairly appear of what states the parties are citizens.*

Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of *Express Company v. Kountze*, 8 Wall., 342 (CARRIERS, §§ 1499-1502), which was sustained by the court. All that is necessary is, that it fairly appear by the bill of what states the respective parties are citizens. In this case the form of the allegations leaves no room for reasonable doubt.

§ 884. *Under the judiciary act of 1789 a suit could not be maintained in the circuit court for Tennessee against a citizen of Tennessee and a citizen of New York.* (See § 882, *supra*.)

The other exception, that Andrews, the principal defendant, was not a citizen of the state where the suit was brought, is entitled to more weight. Though the constitution declares that the *judicial power* of the federal government shall extend to controversies between citizens of different states, which would embrace the case before us (the plaintiff being a citizen of Georgia, and Andrews a citizen of New York), yet congress has not established any *court*, except the circuit court, to take cognizance of such cases; and, by the judiciary act of 1789, which establishes that court, congress only invested it with jurisdiction of cases where the suit is between a citizen of the state where the suit is brought, and a citizen of another state (section 11), and moreover declared that no civil suit should be brought before said court against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The case is certainly not within the purview of this statute. The suit is brought in west Tennessee, and neither Jones, the complainant, nor Andrews, the defendant, is a citizen of that state. Besides, the suit is brought against Andrews in a district of which he is not an inhabitant, and in which

he was not found at the time of serving the writ. Under the act of 1789, and the ruling of the early cases, the court would, *prima facie*, be without jurisdiction. According to those cases the plaintiff, or each of the plaintiffs, if more than one, must be able to sue each of the defendants, if more than one.

§ 885. *The act of February 28, 1839, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear.*

But the act of February 28, 1839, by implication, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear therein. The suit can proceed against them if they voluntarily appear, or without them if they are not necessary parties. If, however, they are necessary parties, and do not voluntarily appear, the difficulty remains the same as before the act of 1839 was passed. *Tobin v. Walkinshaw*, 1 McAl., 26. In this case Andrews *was* a necessary party, and he was not a resident of the district, and was not served with process, but he did voluntarily appear. It is true that as soon as he appeared, he moved a dismissal of the bill on two grounds: (1) That it did not show such facts in regard to the citizenship or residence of the defendants as to give the court jurisdiction. (2) That it contained no equity. Whether, if he had made the motion on the first ground alone, he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the circuit court, dismissing the bill for want of jurisdiction, must be reversed.

§ 886. *A bill for injunction against garnishment proceedings is a supplementary suit, and the court has jurisdiction irrespective of residence.*

But the case is stronger than this. The jurisdiction of the court did not depend on the residence or citizenship of the parties. The suit is, in its nature, not an original but a defensive or supplementary suit, like a cross-bill, or a bill filed to enjoin a judgment of the same court. The bill is filed for an injunction against the garnishment proceedings under the suit at law for the delivery up of the complainant's notes, and for the establishment of his set-off against Andrews. This is, in substance, its character, and if the facts charged furnish a sufficient ground of equity for the relief asked, as to which the court refrains from expressing any opinion, the complainant had a right to file it against the defendants, and the court had a right to take cognizance of it as a defensive or supplementary proceeding, growing out of and having direct reference to the proceedings of the defendants in the same court against him. The case, in this respect, as before said, is analogous to that of a cross-bill or bill of review, or a bill for injunction against a judgment at law in the same court, of which the court has jurisdiction irrespective of the residence of the parties. *Logan v. Patrick*, 5 Cranch, 288; *Simms v. Guthrie*, 9 id., 25; *Clarke v. Mathewson*, 12 Pet., 164 (§§ 634, 635, *supra*); *Dunlap v. Stetson*, 4 Mason, 349. As to bills for injunction against judgments at law rendered in the same court, Justice Story, in *Dunlap v. Stetson*, says: "I believe the general, if not universal, practice has been to consider bills of injunction upon judgments in the circuit courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very

inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required."

Let the decree of the circuit court be reversed, and the cause remitted for further proceedings, each party to pay his own costs on this appeal.

Decree accordingly.

OBER v. GALLAGHER.

(3 Otto, 199-208. 1876.)

APPEAL from U. S. Circuit Court, Eastern District of Arkansas.

STATEMENT OF FACTS.—In 1867 Thompson bought land in Arkansas from Fleming, at the price of \$60,000, the purchase money to be paid in ten equal annual instalments. Notes were given expressing the consideration on their face, and a deed executed in which a lien for the purchase money was retained. Thompson was then a citizen of Louisiana, and Fleming of Arkansas. Fleming collected one of the notes, and soon thereafter (in 1867) transferred the other notes to Gallagher, who sued Thompson in a state court of Louisiana on the note for \$6,000 maturing March 4, 1869, and recovered judgment thereon, but was unable to collect it. There was, at the time of Thompson's purchase, a judgment against Fleming, which was a lien on part of the land. This land was sold under that judgment to English, who transferred it to Ober, to whom also Thompson conveyed it. This bill was filed by Gallagher, a citizen of Louisiana, against Ober, of Arkansas, and Thompson, who had become a citizen of Tennessee, but who was served with process in Arkansas. It charged collusion between Ober, English and Thompson, and that the purchase of English was for the benefit of Thompson. To this bill there was a demurrer, which was overruled. Thompson elected to stand by his demurrer, but Ober answered denying the equity of the bill. There was a decree in favor of Gallagher for \$49,903, amount then due on the notes in his hands, and establishing a lien on all the land. Ober appealed.

Opinion by WAITE, C. J.

No errors have been assigned, either upon the record or in the briefs of counsel, as required by our rule 21. For this reason we might very properly affirm the decree without looking into the record; but, as the case has been submitted and briefs filed on both sides, we will, without making this a precedent to justify such neglect of this salutary rule in the future, proceed to the consideration of the points suggested by the counsel for the appellant in opposition to the decree.

§ 887. *The circuit court has jurisdiction, under the act of 1839, of a local suit in equity brought in the district where the land is situated, if one of the defendants is an inhabitant thereof; and the decree binds all who are duly served, or who appear.*

1. It is insisted that, as Thompson was, at the time of the commencement of the suit, a citizen of Tennessee, and a necessary party, the court could not take jurisdiction of the cause; and, in support of this objection, it is said that, where there is a plurality of plaintiffs or defendants, *each one* must have the requisite character of citizenship to sue and be sued.

The question here presented cannot be one of practical importance in the future, as the act of March 3, 1875 (18 Stat., 470, sec. 1), has extended the jurisdiction of the circuit courts to controversies "between citizens of different

states," using for that purpose the very words of the constitution (art. 3, sec. 2), and thus avoiding the embarrassments that frequently arose under the act of 1789 (1 Stat., 78, sec. 11), which limited their authority to controversies between "a citizen of the state where the suit is brought and a citizen of another state." It is therefore sufficient to say that, since the act of February 28, 1839 (5 Stat., 321, sec. 1), it has never been doubted that the circuit courts had jurisdiction of a suit in equity of a local nature, where a citizen of one state prosecuted citizens of other states in a district where the property in controversy was situated, and of which one of the defendants was an inhabitant. If all the defendants were served with process in the district, or voluntarily appeared in the suit, the decree, when passed, would bind all. But if they were not served, or did not appear, and they were not indispensable parties, the case might proceed without them, and their interests would not be affected by what was done in their absence. If, however, an indispensable party was a citizen of the same state with the plaintiff, the jurisdiction would be defeated; because the controversy would not be between citizens of different states, and thus not within the judicial power of the United States as defined by the constitution. The decisions to this effect are numerous. *Hagan v. Walker*, 14 How., 36; *Shields v. Barrow*, 17 id., 141; *Clearwater v. Meredith*, 21 id., 492 (§ 882, *supra*); *Inbusch v. Farwell*, 1 Black, 571; *Barney v. Baltimore City*, 6 Wall., 286 (§§ 1221–25, *infra*); *Jones v. Andrews*, 10 id., 332 (§§ 883–886, *supra*); *Commercial & R. R. Bank of Vicksburg v. Slocomb*, 14 Pet., 65. In *Louisville Railroad Company v. Letson*, 2 How., 497 (§§ 1346–50, *infra*), it is also distinctly stated (p. 556) that the act of 1839 "was passed exclusively with an intent to rid the courts of the decision in the case of *Strawbridge v. Curtiss*," 3 Cranch, 267 (§ 881, *supra*); which, with that of *The Bank v. Deveaux*, 5 Cranch, 84 (§§ 1344–45, *infra*), had "never been satisfactory to the bar." p. 555.

Here Gallagher could sue both Thompson and Ober separately in the courts of the United States, and they could each sue him. The suit is of a local nature, its object being to subject lands in Arkansas to the payment of a debt. It must, therefore, be brought in the district where the property is situated. Ober is a citizen of that state and is the principal defendant. The relief demanded consists in bringing his property to sale to pay a debt charged upon it. As to him the court confessedly had jurisdiction. Thompson, though a citizen of Tennessee, was served with process in Arkansas, and this, under the provisions of the act of 1839, brought him into the case and within the jurisdiction of the court.

§ 888. *When the indorsee of a promissory note sues, not on the note, but on a judgment already obtained thereon, the circuit court may take jurisdiction although the payee could not have sued in that court.*

2. As Fleming, the payee of the notes secured by the lien, was, when the suit was commenced, a citizen of Tennessee, and consequently incompetent to sue Thompson, also a citizen of that state, in the courts of the United States, it is claimed that Gallagher cannot maintain this suit.

This objection is also based upon a clause in section 11 of the judiciary act of 1789, repealed by the act of March 3, 1875, which provides that no circuit court shall have cognizance of any suit to recover the contents of a promissory note in favor of an assignee, unless a suit might have been prosecuted in such court to recover such contents if no assignment had been made. Under this act it was held in *Sheldon v. Sill*, 8 How., 441 (§§ 1194–95, *infra*), that an indorsee of a negotiable promissory note, secured to the payee by a mortgage, could not

sue in the courts of the United States to foreclose the mortgage, unless the mortgagee could. Gallagher did not sue in this case originally as the indorsee of a note, but as the owner of a judgment of record in his own favor, secured by a lien which he asked to have enforced. The note was no longer in existence as an outstanding liability. It had been merged in the judgment, and was, as a note, extinguished. Gallagher no longer claims as the assignee of the note, but as the owner of a judgment in his favor against Thompson. He can sue Thompson upon the judgment in the courts of the United States in Tennessee. As was well said by Mr. Justice Story in *Bean v. Smith*, 2 Mason, 269, "It is no objection to the jurisdiction that at some anterior period the transaction assumed a shape not within the reach of that jurisdiction. It is sufficient, if it has now become so modified by the act of the parties, or by the principles of law, that jurisdiction now rightfully attaches." Thompson is no longer a debtor by note to Fleming, but by judgment to Gallagher. In the collection of the judgment Gallagher does not sue or proceed upon the note and its assignment, but upon the judgment.

The court had, therefore, jurisdiction of the suit as originally brought, and this jurisdiction was not defeated by the amendment which introduced the notes, not in judgment, but secured by the lien, into the case. Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief. Story's Eq., 64½. If the amendment had not been made, the court would in its decree have taken care to protect the rights of the holders of the outstanding notes, and that is all it is called upon to do by the amendment. Having jurisdiction for one purpose, it may be retained for all within the general scope of the equities to be enforced.

§ 889. *A lien retained on the face of a deed is an equitable mortgage and passes by an assignment of the note it secures.*

3. Another objection urged is, that the assignment of the notes by Fleming did not transfer the lien he had reserved as security for their payment. It is undoubtedly true that in many of the states the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase money does not pass by an assignment of the debt; but here the lien was not left to implication, it was expressly reserved. In fact it is more than a lien. In equity it is a mortgage, so made by express contract. The acceptance by Thompson of the deed containing the reservation amounts to an express agreement on his part that the land should be held as security for the payment of what he owed on account of the purchase money. This created an equitable mortgage; and such a security passes by an assignment of the debt it secures. We so held in *Batesville Institute v. Kauffman*, 18 Wall., 154, a case which also came from the eastern district of Arkansas.

§ 890. — *the law of Arkansas is not otherwise.*

It is claimed, however, that the law of Arkansas is different, and that the supreme court of that state has decided that a lien to secure the payment of purchase money expressly reserved by the vendor in his deed does not pass by an assignment of the debt. If such was the settled rule of law in the state when the notes which are under consideration in this case were assigned, we should be compelled to recognize it as a rule of property there, and be governed accordingly. *Suydam v. Williamson*, 24 How., 434. But we do not understand such to have been the fact. The first case in which this ruling was made was *Sheppard v. Thomas*, 26 Ark., 617, decided at the June term, 1871,

by a divided court, two out of the five judges dissenting. This case was followed also by a divided court in *Jones v. Doss*, 27 Ark., 518, decided at the December term, 1872; but almost immediately thereafter, April 24, 1873, the legislature provided by statute as follows: "The lien or equity held or possessed by the vendor of any real estate, for the sale of the same, shall inure to the benefit of any assignee of the notes or obligations given for the purchase money of such real estate, and such lien or equity shall be assignable and payable by indorsement or otherwise in the hands of such assignee, and any such assignee may maintain an action or suit to enforce the same: Provided, the said lien or equity is expressed upon or appears from the face of the deed of conveyance." Pamphlet Laws, 1873, p. 217, sec. 28.

This legislation was followed, at the December term, 1873, by the case of *Campbell v. Rankin*, 28 Ark., 401, in which it was strongly intimated that, if it were necessary, the previous cases in which this question was decided would be overruled. Under these circumstances, we are not satisfied that, when these notes were assigned, it was a settled rule of property in Arkansas that a lien for purchase money expressly reserved would not pass by an assignment of the debt. Such being the case, the circuit court was right in following our decision in *Batesville Institute v. Kauffman*, especially as its decision was not made until after the doubts expressed in *Campbell v. Rankin*, as to the correctness of the rulings in the previous cases.

§ 891. *The holder of a note secured by mortgage may proceed at law or in equity, or both, at the same time.*

4. It is finally insisted that Gallagher must exhaust his remedies at law before he can come into a court of equity to subject the land. This is not a creditor's bill to reach equitable assets. There is no attempt to enforce the judgment as a judgment, but to reach securities held for the debt. The suit is in reality one to enforce a mortgage given to secure a note, but not commenced until after the note had gone into judgment at law. The note was merged in the judgment, but the lien which secured it was not; that was simply transferred from the note to the judgment.

An election to sue at law upon a note secured by mortgage does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage. He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained. This disposes of all the questions presented in the demurrer, and brings us to a consideration of the case upon its facts. Without going into the details of the evidence, it is sufficient to say that we are entirely satisfied that English purchased the property in Pulaski county at the sheriff's sale, for the benefit of Thompson; that Thompson either furnished him the money to pay the sheriff, or repaid him what he may have advanced within a short time thereafter; that the sale to Ober was made by Thompson to pay or secure a debt he owed; that English conveyed to Ober at the request of Thompson, and to give effect to the arrangement he had made; that Ober, at the time of his purchase, had full knowledge of all the facts, and that he took the title to the property incumbered by the lien reserved in the deed from Fleming.

It follows that the decree of the circuit court was right, and it is, therefore, affirmed.

LOVEJOY *v.* WASHBURNE.

(Circuit Court for Illinois: 1 Bissell, 416-418. 1863.)

STATEMENT OF FACTS.—Action against E. B. Washburne and Dorillus Morrison, both of the state of Illinois; process served upon Washburne alone; since which time Morrison has entered his appearance, and both defendants have pleaded to the jurisdiction as follows: That this court cannot take further cognizance of the action, because at the time of, and prior to, its institution, the said Morrison was, and still is, a citizen of Minnesota, and not of Illinois, as in the declaration alleged, and that the said plaintiffs are also citizens of Minnesota, etc.

§ 892. *Where one of the defendants, joint contractors, is a citizen of the same state as plaintiff, a mere omission to serve process upon such defendant will not confer jurisdiction upon this court in the controversy.*

Opinion by DRUMMOND, J.

The jurisdiction of the circuit court is founded upon the eleventh section of the judiciary act of 1789. 1 Stat. at Large, 78. The clause "or the suit is between a citizen of the state where the suit is brought and a citizen of another state" would, in the case of a several or joint and several contract, authorize a suit against citizens of another state on their several liability, without joinder of citizens of the same state; but in the case of a joint contract where all parties must be joined, the mere omission to serve process on parties residing in the same state with the plaintiff would not confer jurisdiction. Such parties may at any time enter their appearance, and the suit will be dismissed for want of jurisdiction.

BRIGHAM *v.* LUDDINGTON.

(Circuit Court for New York: 12 Blatchford, 237-243. 1874.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—The complainant herein files his bill as receiver of the debts, property, equitable interests and things in action of the Milwaukee & Superior Railroad Company, a corporation created by and under the laws of the state of Wisconsin. His appointment and his authority as such receiver are derived as follows: One William B. Smith recovered a judgment against the said railroad company on the 9th of August, 1860, for \$3,029.50, in the United States district court for the district of Wisconsin. The execution which was issued upon the said judgment was returned wholly unsatisfied. Thereupon the said Smith filed his bill in equity in the said court, as a judgment creditor, to discover rights, debts, equitable interests, property and assets of the judgment debtor, and to compel the application thereof to the payment of the said judgment. This bill was taken *pro confesso* against the said railroad company November 27, 1860. Under subsequent acts of congress the said suit has been transferred to, and jurisdiction thereof has become vested in, the circuit court of the United States for the eastern district of Wisconsin. Thereafter, on the 15th of October, 1870, the complainant herein was, by an order of the last-named court, appointed receiver as aforesaid, and gave security for the due performance of his duty.

The nature and object of this present suit appear as follows: In 1857 the said railroad company hypothecated with the Boston Locomotive Works certain notes and mortgages upon real estate in Wisconsin, known as farm mortgages,

to secure to the said locomotive works the payment of notes of the said railroad company to the amount of \$18,000, given for locomotive engines. By assignment the debt last mentioned came to Drury & Page, of Massachusetts, who recovered judgment thereon, which, being unsatisfied, Drury & Page, by bill in the aforesaid circuit court, proceeded against the said railroad company and the firm of Cross, Luddington & Scott to enforce payment of said judgment out of property of the railroad company, alleged to have come to the hands of Cross, Luddington & Scott, and which ought to be applied to the satisfaction of the said judgment. Such proceedings were had in that suit that on the 2d of May, 1870, a final decree was therein rendered, by the said circuit court, that the said Drury & Page recover of Cross, Luddington & Scott the sum of \$19,110.68, with interest, amounting in all at the date of the said decree to \$33,398.55. By subsequent assignments, etc., the debt originally due to the Boston Locomotive Works, and all securities therefor, including the last-named decree, came to the defendants in this present suit, Barling and Davis. That debt, including interest, amounted at the date of the last-named decree to \$36,182.84. On the 18th of June, 1870, Barling and Davis sold the said debt, with all the securities held therefor, including the said decree against Cross, Luddington & Scott, but hold and still retain the farm mortgages, until they shall be released from responsibility to the railroad company, or be satisfactorily indemnified against liability or accountability therefor. It is conceded that the decree against Cross, Luddington & Scott is good and collectible. The complainant herein seeks to compel the collection of this decree and its application, or its application without actual collection, towards the satisfaction of the debt of \$36,182.84, offering to pay the deficiency and any other just proper charges and demands, and prays that thereupon the aforesaid farm mortgages be delivered to him, to be by him enforced or collected for the payment and satisfaction of the said judgment in favor of William B. Smith, upon whose bill, as judgment creditor, the complainant herein was appointed receiver, as above stated.

The foregoing are all the facts which seem to be necessary to make the points hereafter considered intelligible. These points will be very briefly disposed of.

§ 893. *Where a receiver of a corporation seeks by bill to recover its property and apply the same for the benefit of a judgment creditor, the corporation is a necessary party.*

1. It is objected that this suit is defective for want of parties, and that the presence of the Milwaukee & Superior Railroad Company is indispensable. This objection is well founded. The bill seeks a recovery of the property of that company from the hands of parties who are accountable to the company therefor, and seeks to apply that property for the benefit of an alleged judgment creditor of the company. In such a pursuit, two things are clear: (1) The defendants ought not to be required to surrender the property, except by a proceeding which shall operate as a full and final protection to them against any future claim by the railroad company to recover the same. A decree herein would not be conclusive against the railroad company, nor can a decree herein, granting the relief sought, be made saving the rights of the said railroad company, without leaving the defendants liable to account to the railroad company for the very property which the decree compels them to surrender. (2) The property pursued is the property of the railroad company. The company has a direct interest in any disposition or appropriation thereof. However

clear, upon the facts appearing in this suit — exhibited, so far as the company is concerned, *ex parte* — it may seem to be, that the complainant is entitled to the relief prayed, it is no less clear that the company has an interest in, and a right to be heard touching, any interference with or disposition of the property in question, which may affect their future right of reclamation, and touching the terms and conditions upon which relief should be granted, and the extent to which, as the fruit of this litigation, a recovery here should inure to the satisfaction of their debt to Smith; and they have especially such interest, inasmuch as, apparently, the property sought to be recovered is more than sufficient for the satisfaction of the Smith judgment, and the surplus will belong to the company. They should be heard, also, in relation to the payment to be made to the defendants, and the charges to be allowed to the defendants, or either of them, as a condition of requiring the surrender. No decree granting the relief sought can, in this aspect of the case, be made saving the rights of the said company; for granting the relief is adjudicating upon those rights, and thus such attempted saving would be a contradiction of the decree itself. See *Florence Sewing Machine Co. v. Singer Manufacturing Co.*, 8 Blatch., 113, and cases there cited. It follows that this suit cannot be maintained without making the railroad company a party.

§ 894. *Where a necessary party defendant is omitted in bringing the suit, he cannot be brought in subsequently, even by consent, if his citizenship would defeat the jurisdiction.*

2. It is suggested, in one of the briefs, that if the court should be of the opinion that the Milwaukee & Superior Railroad Company is a necessary party, an order should be made directing the railroad company to be brought in as a defendant, under and by virtue of section 13 of the act of congress of June 1, 1872 (17 U. S. Stat. at Large, 198); and that all the present parties would be satisfied with such an order, since they all desire a decree on the merits. Although that act was passed since this suit was brought, I am inclined to think it is sufficiently comprehensive to warrant such an order. But hereupon a difficulty occurs, which is fatal to any proceeding thereafter in continuance of this suit. If the railroad company be brought in as defendant it will defeat the jurisdiction of the court over the suit itself. The complainant and one of the then defendants will be citizens of the same state — Wisconsin. I know of no mode in which this difficulty can be overcome. The question would then be one of jurisdiction, not of parties, but of the action. That jurisdiction cannot be gained even by consent of parties; and, where an action cannot be sustained between the complainant and each one of the defendants, the court has no jurisdiction of the action. *Strawbridge v. Curtiss*, 3 Cranch, 267 (§ 881, *supra*); *Ward v. Arredondo*, 1 Paine, 410; *Ketchum v. Farmers' Loan & Trust Co.*, 4 McL., 1; *Coal Company v. Blatchford*, 11 Wall., 172 (§§ 897, 898, *infra*); *Northern Ind. R. Co. v. Mich. Cent. R. Co.*, 15 How., 233; *Horn v. Lockhart*, 17 Wall., 570. The act of 1872 does not prevent this result. It authorizes, in certain cases, the bringing in of parties defendant not found within the district. It prescribes a substitute for service of process, but neither enlarges nor affects the jurisdiction of the court over the action itself. If the court would not have such jurisdiction had the defendant been found and served within the district, it cannot acquire such jurisdiction by order published as directed in that act. Neither the constitution nor the judiciary act of 1789, as uniformly construed by the federal courts, gives jurisdiction of an action where the complainant and one of the defendants are citizens of

the same state. Nor does anything in the act of 1872 warrant the suggestion that congress intended anything more than to furnish a means of obtaining jurisdiction of the person of a defendant not found within the district, in actions whereof the court, under the constitution and existing statutes, would have jurisdiction, if all of the defendants were personally served with process within the district, or voluntarily appeared. To adopt the opposite construction would lead to the absurdity, that, when a defendant voluntarily appeared, or was personally served within the district, the court would have no jurisdiction of the action; but when, by the mere accident of absence from the district, the defendant could be served by order and publication, jurisdiction would be obtained. I conclude, therefore, that an order to bring in the absent defendant would be of no advantage to the complainant.

§ 895. *A receiver appointed in one circuit cannot sue in another.*

3. I notice, without enlarging upon the subject, a further objection, viz., that the complainant, having no right or authority, except such as was conferred by an order of the circuit court of the United States for the eastern district of Wisconsin, cannot maintain this suit in this district. The opinion of the supreme court in *Booth v. Clark*, 17 How., 322, seems to me fully to sustain this objection. That was an action in the circuit court for the District of Columbia, by a receiver appointed under a creditor's bill filed in a court of equity of the state of New York. He was held not entitled to sue. The suggestion of counsel, that the circuit court for this district and the circuit court for the eastern district of Wisconsin derive their authority from the same government and the same federal laws, does not meet the difficulty. The decision did not proceed upon the sole ground that the jurisdiction of New York was foreign to that of the federal courts; but on the ground that such a receiver could not sue in another territorial jurisdiction. The circuit court for this district and the circuit court for the eastern district of Wisconsin each exercises a local and limited jurisdiction, and I am not able to withdraw this case from the operation of the decision of the supreme court above cited. See, on this subject, *Hope Mutual Life Ins. Co. v. Taylor*, 2 Robertson, 278.

To the suggestion of counsel that, by the statutes of Wisconsin, receivers appointed on creditors' bills are vested with full title, and have full authority, to maintain suits, which this court ought to recognize, it must suffice to say: (1) This receiver was appointed under and by virtue of the general power of courts of equity, and with such effect only as is due to the order of the court making the appointment. He was not appointed under or by virtue of any statute. (2) The statutes of the state of Wisconsin cannot enlarge or alter the effect of an order or decree of the circuit court of the United States, nor enlarge or modify the jurisdiction of that court or its efficiency. *Payne v. Hook*, 7 Wall., 425.

These views render it wholly unnecessary to consider the merits of this suit or the various matters ably discussed on the hearing. I am constrained to conclude that the bill should be dismissed.

RICE v. HOUSTON.

(13 Wallace, 66-68. 1871.)

ERROR to U. S. Circuit Court, Middle District of Tennessee.

STATEMENT OF FACTS.—This suit was brought by Houston, administrator of the estate of Vanleer, on notes given by Rice to Vanleer. Vanleer, at the

time of his death, was a citizen of Tennessee. Houston described himself as a citizen of Kentucky, and as administrator of the estate of Vanleer.

§ 896. *The citizenship of the administrator and not that of his intestate determines the jurisdiction of the circuit court.*

Opinion by MR. JUSTICE DAVIS.

The question of jurisdiction is the only point in the case. Although in controversies between citizens of different states, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this court that suits can be maintained in the circuit court by executors or administrators if they are citizens of a different state from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law. And it makes no difference that the testator or intestate was a citizen of the same state with the defendants, and could not, if alive, have sued in the federal courts; nor is the *status* of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same state with the defendants. *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 307; *Browne v. Strode*, 5 id., 303; *Childress v. Emory*, 8 Wheat., 669; *Osborn v. Bank of the United States*, 9 id., 856; *McNutt v. Bland*, 2 How., 15 (§§ 878–880, *supra*); *Irvine v. Lowry*, 14 Pet., 298 (§§ 1207–1209, *infra*); *Huff v. Hutchinson*, 14 How., 586; *Coal Company v. Blatchford*, 11 Wall., 172 (§§ 897, 898, *infra*).

In this state of the law on this subject, it is not perceived on what ground the right of Houston to maintain these suits can be questioned. He was a citizen of Kentucky, had the legal interest in the notes sued on by virtue of the authority conferred on him by the court in Tennessee, and, therefore, had a right to bring his action in the federal or state courts at his option. It is to be presumed, in the absence of an averment in the pleadings to the contrary, that Houston, when appointed administrator, was a citizen of Kentucky, and if so the appointment was legal, for the laws of Tennessee do not forbid the probate courts of that state to intrust a citizen of another state with the duties of administering on the estate of a person domiciled at the time of his death in Tennessee.

But if the fact be otherwise, as seems to be admitted in argument, and Houston were a citizen of Tennessee at the time he got his letters of administration, the liability of the defendants to be sued in the federal courts remains the same, because there is no statute of Tennessee requiring an administrator not to remove from the state, and the general law of the land allows any one to change his citizenship at his pleasure. After he has in good faith changed it, he has the privilege of going into the United States courts for the collection of debts due him by citizens of other states, whether he holds the debts in his own right or as administrator.

Judgment affirmed.

COAL COMPANY v. BLATCHFORD.

(11 Wallace, 172–178. 1870.)

APPEAL from U. S. Circuit Court, Western District of Pennsylvania.

STATEMENT OF FACTS.—This was a bill filed by a citizen of New York and a citizen of Pennsylvania, as trustees for an alien, and a citizen of New Jersey,

against a Pennsylvania corporation. The question is one of jurisdiction growing out of citizenship.

§ 897. *The right of trustees to sue in the circuit court depends upon their own citizenship, and not at all upon that of the cestuis que trust.*

Opinion by MR. JUSTICE FIELD.

The eleventh section of the judiciary act of 1789 vests in the circuit courts original jurisdiction of suits of a civil nature, at law and in equity, when the matter involved exceeds, exclusive of costs, the sum or value of \$500, in three classes of cases: 1st, when the United States are plaintiffs or petitioners; 2d, when an alien is a party; and 3d, when the suit is between a citizen of the state where the suit is brought and a citizen of another state. In the last two classes the designation of the party, plaintiff or defendant, is in the singular number, but the designation is intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons all of whom are entitled to sue, or are liable to be sued, in the federal courts. *Strawbridge v. Curtiss*, 3 Cranch, 267 (§ 881, *supra*). In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained. Executors and trustees suing for others' benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified. This has been repeatedly adjudged. It was so adjudged as early as 1808 in *Chappedelaine v. Dechenaux*, 4 Cranch, 307, where the complainants, though citizens of France, brought suit, one as residuary legatee and the other as administrator *de bonis non* of a testator, who had been a citizen of Georgia, against the defendant, who was a citizen of that state. Counsel, on opening the question of jurisdiction, was stopped by the court, Mr. Chief Justice Marshall observing that the impression of the court was that the case was clearly within the jurisdiction of the courts of the United States; that the plaintiffs were aliens, and, although they sued as trustees, they were entitled to sue in the circuit court. This ruling was followed in *Childress v. Emory*, 8 Wheat., 669; and in *Osborn v. The Bank of the United States*, the chief justice laid it down as a universal rule that, in controversies between citizens of different states, the jurisdiction of the federal courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record. (See CONST., §§ 2363-87.)

These authorities are conclusive of the present case. The defendant is a corporation created under the laws of Pennsylvania. One of the plaintiffs, Blatchford, describes himself in the bill as a citizen of the state of New York, and the plaintiff Newman describes himself as a citizen of Pennsylvania, and they both describe themselves as trustees who sue solely for the use of Henry Beckett, an alien and a subject of the queen of Great Britain, and of Joseph Loyd, a citizen of New Jersey. The demurrer of the defendant raises the objection that the plaintiff Newman is a citizen of the same state with the defendant, and that the court has in consequence no jurisdiction of the case. If there were no other parties the suit clearly would not lie, for the eleventh section of the judiciary act only authorizes a suit between citizens of different states, not between citizens of the same state. And the objection, according to the construction we give to that section and to the authorities cited, is

equally available when a disqualified party is joined with others who are qualified.

The cases of *Browne v. Strode*, 5 Cranch, 303, and *McNutt v. Bland*, 2 How., 10 (§§ 878–880, *supra*), upon which the plaintiffs rely, do not aid them. In the first case the action was on a bond given by an executor for the faithful execution of his testator's will in conformity with the statute of Virginia, which required all such bonds to be made payable to the justices of the peace of the county where administration was granted, but allowed suits to be brought upon them at the instance of any party aggrieved. The object of the action was to recover of the defendant, a citizen of Virginia, a debt due by the testator to a British subject, and was brought in the name of the justices of the peace of the county, who were also citizens of that state. It was held that the circuit court had jurisdiction.

In *McNutt v. Bland* the action was on a bond given by a sheriff of a county in Mississippi. By the law of that state sheriffs were required to execute bonds to the governor of the state and his successors, conditioned for the faithful performance of the duties of their office, which bond could be prosecuted at any time by any party injured until the whole amount of the penalty was recovered. The action in the case cited was brought in the name of the governor for the use of citizens of New York, against the defendants, who were citizens of Mississippi. Upon demurrer it was held by this court that the circuit court had jurisdiction.

“In this case,” said the court, “there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants. As the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is on the bond and to the suit upon it, but in no just view of the constitution or law can he be considered as a litigant party; both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law.” The court then cites the case of *Browne v. Strode*, and states the principle on which it was decided to be, “that where the real and only controversy is between citizens of different states, or an alien or a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.”

There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt v. Bland*, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace in the one case and the governor in the other were the mere conduits through whom the law afforded a remedy to the parties aggrieved. In the case at bar the plaintiffs are the real prosecutors of the suit. They are parties to the mortgage contract negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made. The right to use different remedies is expressly provided upon default in the payments stipulated, and the adoption of either rests at the option of the plaintiffs. So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them.

§ 898. *A plea in abatement is needed to raise the question of citizenship only when the averments are sufficient, and defendant wishes to controvert the facts.*

The case is not one where a plea in abatement was required to raise the question of citizenship. Here the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer or taken advantage of without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits.

It follows, from the views expressed, that the decree of the court below must be reversed, and that the cause must be remanded with directions to the court to dismiss the bill for want of jurisdiction.

CONOLLY v. TAYLOR.

(2 Peters, 556-565. 1829.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—As an objection was made to the jurisdiction of the court in this case, it may be proper, in order to prevent a possible misunderstanding of the principle on which jurisdiction is sustained, briefly to state it.

The bill is filed in the court of the United States, sitting in Kentucky, by aliens, and by a citizen of Pennsylvania. The defendants are citizens of Kentucky except one, who is a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court cannot be questioned, so far as respects the alien plaintiffs. As between the citizen of Pennsylvania and of Ohio, neither of them being a citizen of the state in which the suit was brought, the court could exercise no jurisdiction. Had the cause come on for a hearing in this state of parties, a decree could not have been made in it for the want of jurisdiction. The name of the citizen plaintiff, however, was struck out of the bill before the cause was brought before the court; and the question is, whether the original defect was cured by this circumstance; whether the court, having jurisdiction over all the parties then in the cause, could make a decree.

§ 899. *The jurisdiction of the federal court is not defeated by the fact that, at the institution of the suit, a person was named as plaintiff whose citizenship would have defeated jurisdiction.*

The counsel for the defendants maintain the negative of this question. They contend that jurisdiction depends on the state of the parties at the commencement of the suit; and that no subsequent change can give or take it away. They say that if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested by this circumstance. So if a citizen sue a citizen of the same state, he cannot give jurisdiction by removing himself and becoming a citizen of a different state. This is true, but the court does not understand the principle to be applicable to the case at bar. Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. The court in the first case had complete original jurisdiction; in the last it had no jurisdiction, either in form or substance. But if an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise its jurisdiction while this defect in the bill remained,

yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause.

So in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed, between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course. Upon examining the record, the judges are divided in opinion on the question whether the defendants, who are purchasers, have taken the lands charged with the equity which was attached to it while in possession of Campbell and his heirs; or are to be considered as purchasers without notice. It would be useless to state the arguments and facts in support of each opinion. The decree is affirmed by a divided court.

CORPORATION OF NEW ORLEANS *v.* WINTER.

(1 Wheaton, 91-95. 1816.)

ERROR to U. S. District Court, District of Louisiana.

STATEMENT OF FACTS.—One of the petitioners in this case was described as a citizen of Kentucky, and the other as a citizen of the Mississippi Territory. There was judgment in the court below for the petitioners.

§ 900. *Under the judiciary act, a citizen of a territory is not capable of suing in the federal courts.*

Opinion by MARSHALL, C. J. (after stating the facts).

The proceeding of the court, therefore, is arrested *in limine*, by a question respecting its jurisdiction. In the case of *Hepburn v. Ellzey*, 2 Cranch, 445 (§ 901, *infra*), this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the circuit court of the United States. That opinion is still retained. It has been attempted to distinguish a territory from the District of Columbia; but the court is of opinion that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state in the sense in which that term is used in the constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States under the judiciary act (Stats. at Large, 73), is equally applicable to a citizen of a territory. Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the circuit court of Louisiana. Is his case mended by his being associated with others who are capable of suing in that court? In the case of *Strawbridge v. Curtiss*, 3 Cranch, 267 (§ 881, *supra*), it was decided that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they are compelled to unite. The circuit court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed.

Judgment reversed.

HEPBURN v. ELLZEY.

(2 Cranch, 445-453. 1804.)

§ 901. *A citizen of the District of Columbia is not a citizen of a state, within the clause of the judiciary act conferring jurisdiction on the circuit court.*

Opinion by MARSHALL, C. J.

The question in this case is, Whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia. This depends on the act of congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state. On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, "a state," according to the definitions of writers on general law. This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution.

The house of representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative. The senate of the United States shall be composed of two senators from each state. Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives.

These clauses show that the word state is used in the constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it. Other passages from the constitution have been cited by the plaintiffs to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed upon them. But this is a subject for legislative, not for judicial, consideration. The opinion to be certified to the circuit court is, that that court has no jurisdiction in the case.

ADLER v. NEWCOMB.

(Circuit Court for Missouri: 2 Dillon, 45. 1872.)

§ 902. *Jurisdiction in suit on a marshal's bond. The petition should ask judgment for the damages sustained.*

Opinion by TREAT, J.

1. The federal courts have jurisdiction in suits by individuals upon a marshal's bond, even where all the parties to the suit are citizens of the same state, the reason being that the act of congress of April 10, 1806, which gives the right

to a party injured by breach of the bond to sue thereon in his own name, puts such party in the place of the United States, and does not take from the federal courts the jurisdiction they had before the act was passed, when suit had to be brought in the name of the United States. 2 Stats. at Large, 372.

2. In a suit upon a marshal's bond, the petition should ask judgment for the damages sustained, and not for the whole penalty of the bond.

BARBER *v.* BARBER.

(21 Howard, 582-605. 1858.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—We regard this as a suit for a wife brought on the equity side of the district court of the United States for the district of Wisconsin, by her next friend, George Cronkhite, a citizen of the state of New York, against Hiram Barber, a citizen of the state of Wisconsin, to give the same validity to a judgment in that state which it has in the state of New York against the defendant for the payment of alimony to his wife, who has been divorced from him *a mensa et thoro*, with an allowance of alimony by a court, which had, when the decree was made, jurisdiction over the parties and the subject-matter.

§ 903. *United States courts have not jurisdiction in cases of divorce.*

We shall not have occasion to comment upon the relations of husband and wife in their uninterrupted coverture, nor will we discuss the general rights, obligations or disabilities of either when they have been separated by a divorce *a mensa et thoro*. Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud. We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.

The record raises these inquiries: Whether a wife divorced *a mensa et thoro* can acquire another domiciliation in a state of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction, to recover from him alimony due, and which he refuses to make any arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case.

We will first direct our attention to the circumstances of the case, and will give them from the bill and answer and from the testimony in the record. Hiram Barber and Huldah Adeline Barber were married in the state of New York, in the year 1840, where his domicile then was, and continued to be until he left it for Wisconsin, which was soon after a decree had been given for a divorce *a mensa et thoro* between them, with an allowance of alimony to be paid by him. Her application for such a divorce was made by Cronkhite, her next friend, in the court of chancery for the fourth district of the state of New York, that court having jurisdiction of the subject-matter and over the parties.

The defendant appeared and resisted the application. The cause was heard on the pleadings and proofs. It resulted in a declaration by the chancellor that the defendant had been guilty of cruel and inhuman treatment of his wife, and of such conduct towards her as to render it unsafe and improper for

her to cohabit with him, and that he had abandoned, neglected and refused to provide for her. And it therefore decreed that the complainant and defendant be separated from bed and board forever; provided, however, that they might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged, and that neither of the said parties shall be at liberty to marry any other person during the life-time of the other party. The court then referred the cause to a master, to ascertain and report what should be allowed and to be paid by the defendant, or out of his estate, to Mrs. Barber, for her suitable support and maintenance. In pursuance of this decretal order and reference, the master made a report. The defendant filed exceptions to it. The cause was regularly brought to a hearing upon the defendant's exceptions. They were overruled, and a final decree was made in the cause. The language of the decree is, that the exceptions are overruled, and that the report of the master is absolutely confirmed. That for the suitable support and maintenance of Mrs. Barber there should be allowed and paid to her by the defendant, or out of his estate, in quarterly instalments, the annual sum of \$360, in each and every year; and that as it appeared he had not given to her any support in the interval between the filing of the bill in her behalf and the rendition of the decree, that the defendant should pay to her \$360 a year in quarterly payments from the 1st day of July, 1844, that being the day when the bill was filed; and it was decreed that the sum of \$960, being the alimony retrospectively due, should be paid forthwith by the defendant, and that the complainant should have execution therefor. It was further ordered that the permanent alimony allowed and to become due after the 1st of March, 1847, to which day alimony is above computed, should be paid by the defendant in quarterly payments on the 1st days of March, June, September and December in each year during the life of Mrs. Barber, and in case of its not being so paid, that the quarterly payments should bear interest as they respectively became due, and that execution might issue therefor *toties quoties*. The court then decreed that the permanent alimony allowed to Mrs. Barber was vested in her for her own and separate use, and as her own and separate estate, with full power to invest the same in a trustee or trustees, as she might think proper to appoint, with the power to dispose of the same by will or otherwise, from time to time, during her life, or at her death, or either, as she may think proper, free from any control, claim or interposition of the defendant. The said decree, with a taxed bill of costs in the suit, was signed and enrolled according to the form of the statute in such cases made and provided in the state of New York.

It is upon a transcript of all the papers in that suit, authenticated as the law requires it to be done, that the suit now before us was brought in the district court of the United States for the district of Wisconsin.

The complainants aver in their bill that they are citizens of the state of New York, and that the defendant is a citizen of the state of Wisconsin. They then set out the proceedings of the court in New York, divorcing Mr. and Mrs. Barber from bed and board, with especial reference to the decree and the entire record of that suit, charging the defendant with not having paid any part of the alimony adjudged to Mrs. Barber; and that there was then due to her on that account the sum of \$4,242.15, with interest at seven per cent., that being the legal rate in the state of New York. The rest of the bill it is not necessary to state more particularly, than that it is a recital of a suit which had been brought upon the common law side of the district court of the United States

for the county of Milwaukee, in the territory of Wisconsin, for the amount of alimony due by the defendant; to the declaration in which he filed a demurrer, upon which a judgment was rendered in his favor, which was afterwards affirmed in the supreme court of the state, for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law. To this bill also the defendant demurred, on account of the case not being within the ordinary jurisdiction of a court of chancery, that the relief sought could only be had in the court of chancery in the state of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York. This demurrer was overruled, and the defendant was ordered to answer. He did so. He admits in his answer the legality and locality of his marriage with Mrs. Barber; the jurisdiction of the court in the divorce case; that a divorce had been decreed between them from bed and board, after contestation; and that by that decree he was subjected to the payment of alimony to the extent and in the way it is claimed in the bill he was then answering. He admits that he left the state of New York without having paid any part of it, or having made any arrangement to do so; alleging, however, that he had left real estate in New York, upon which no proceedings had been taken to make it liable to the decree against him for alimony. And he then goes on to state, that on the 19th day of April, 1852, he had filed his bill in the circuit court of the county of Dodge, in the state of Wisconsin, against Mrs. Barber, she then being his wife, to obtain a dissolution of the marriage contract between them, and that their marriage had been dissolved by a decree of that court, which is on record in the same. And he adds, that his wife by that decree became a *feme sole*; and being so, she could not sue by her next friend, and that her remedy was in a court of law. To this answer a general replication was filed. The cause was carried to a hearing upon the pleadings and proofs, and a decree was made, adjudging that \$5,936.80 is due from the defendant upon the alimony sued for, for principal and interest, to and prior to the time of filing the bill in this cause, and that the defendant should pay it, for the sole and separate support and maintenance of Mrs. Barber, together with the costs, to be taxed within ten days; and in default thereof, that execution should issue for the same. It appears, from the testimony in the cause, that the defendant left the state of New York in a short time after the decree for the divorce and for alimony had been rendered, for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony due, or leaving any estate of any kind out of which it could be paid; for he gave no proof of any kind that he had real estate in the state of New York in support of that allegation in his answer.

It also appears from the record that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York; and that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having wilfully abandoned him. It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the state of New York, upon that decree being carried into judgment in a court of another state of this Union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new

domicile different from that which he had in New York when the decree was made there against him.

The questions made by the bill and the answer, and by the arguments of counsel, we will state in the form of an inquiry. They are as follows: Whether a wife divorced *a mensa et thoro* may not have a domiciliation in a state of this Union different from that of her husband in another state, to enable her to sue him there by her next friend, in equity, in a court of the United States, to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject-matter of divorce?

§ 904. *There are several exceptions both in law and in equity to the general English rule that a feme covert cannot sue.*

In the consideration of these questions, we must not allow ourselves to be misled by the general rule which prevails in England, that a suit cannot be maintained at law by a *feme covert*, and that, notwithstanding a divorce *a mensa et thoro*, a wife cannot sue or be sued in a court of law; for in England she may in several cases maintain a suit in her own name as a *feme sole*, both at law and in equity. They are exceptions to the general rule, or *privileged cases*, under certain circumstances, where it cannot be presumed, from his own acts, that the husband's control of his wife is continued, and where she has been deprived of his protection to represent with her her rights and interests in a suit at law, or in one in equity. The cases mentioned in the books where a *feme covert* may sue as a *feme sole* are: When her husband is banished, or has abjured the realm, or has been transported for felony; where the husband is an alien enemy, and his wife is domiciled in the realm; where the husband is an alien domiciled abroad, and has never been in the realm; or where he has voluntarily abandoned her, and is under a disability to return; so where the husband has deserted the wife in a foreign country, and she goes to England and maintains herself as a *feme sole*; where the husband, in a foreign state, compels his wife to leave him for another political jurisdiction, and she maintains herself there as a *feme sole*.

Cases have been decided in Massachusetts in conformity with the English cases. There are cases in England which have gone much further, but we do not cite them, preferring only to mention such instances as have not been questioned by subsequent cases in England or in the United States. See Story's Equity Pleading, 6th ed., sec. 61, pp. 59, 60, and the cases cited in the notes.

Except in such cases a *feme covert* cannot sue at law, unless it be jointly with her husband, for she is deemed to be under the protection of her husband, and a suit respecting her rights must be with the assent and co-operation of her husband. Mitf. Equity Pl., by Jeremy, 28; Edwards on Parties in Equity, 144, 153; Calvert on Parties, ch. 3, sec. 21, pp. 265, 274; 6 How.

In the case of *Bein v. Heath*, 6 How., 228, this court said without any reference to the law of Louisiana: "That the general rule was, when the wife complains of her husband and asks relief against him, she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court. It is sanctioned in Story's Equity Pleading and by Fonblanque. The modern practice in England has adopted a different course, by uniting the name of the wife with a person other than her husband in certain cases."

There are also exceptions in equity which are wholly unknown at law. Thus, if a married woman claims some right in opposition to the rights claimed by

the husband, and it becomes proper to vindicate her rights against her husband, she cannot maintain a suit against him at law; but in equity she may do so, and against all others who may be proper or necessary parties. But it must be done under the protection of some other person who acts as her next friend, and the bill is accordingly exhibited in her name by such next friend. Story's Equity Pl., 6th ed., sec. 61, p. 61. It is also said in the same work, to be our constant experience, that the husband may sue the wife, or the wife the husband, in equity, notwithstanding neither of them can sue the other at law. *Cannel v. Buckle*, 2 P. Wms., 243, 244; *Ex parte Strangeways*, 3 Atk., 478; *Fonblanque*, Eq., B. 1, ch. 2, sec. 6, note N; *Brooks v. Brooks*, Prec. Ch., 24; *Mitford*, Pl., by Jeremy, 28. These citations have been made to show the large jurisdiction which a court of equity has to secure the rights of married women, when it may be necessary to exert it with the assistance of the husband, or when he improperly interferes with them, so as to make it necessary for the wife to defend herself against his unwarranted claims to her property. The result of that jurisdiction now is, that the wife may, in all such instances, sue her husband by her next friend.

§ 905. *English courts of equity may compel payment of alimony decreed by ecclesiastical court.*

There is, too, another ground of jurisdiction in equity, just as certainly established as that is of which we have just spoken. It comprehends the case before us. It is, that courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England. Such a jurisdiction is ancient there, and the principal reason for its exercise is equally applicable to the courts of equity in the United States. It is, that when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The inference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. *Shaftoe v. Shaftoe*, 7 Ves. Jr., 171; *Dawson v. Dawson*, 7 Ves. Jr., 173; *Haffey v. Haffey*, 14 Ves. Jr., 261; *Angier v. Angier*, Prec. Ch., 497; *Cooper's Eq. P.*, ch. 3, pp. 149, 150; *Coglan v. Coglan*, 1 Ves. Jr., 194; *Street v. Street*, 1 Turn. and Tapel, 322.

§ 906. *A decree of alimony is a judgment of record, and of equal force in all the states.*

The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction.

§ 907. *What is a plain, adequate and complete remedy at law.*

We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the constitution, and from legislation in conformity with it. The first limitation by the latter upon the

jurisdiction of the equity courts of the United States is, that no suit can be sustained in them, where a plain, adequate and complete remedy may be had at law. The court has said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity. *Boyce v. Grundy*, 3 Pet., 210; *United States v. Howland*, 4 Wheat., 108; *Osborn v. United States Bank*, 9 Wheat., 841, 842 (CONSR., §§ 2363-87). It is no objection to equity jurisdiction in the courts of the United States, that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all of the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived." *Livingston v. Story*, 9 Pet., 632. Such a suit for the enforcement of a decree for alimony as that before us is not an exception, unless the court has not jurisdiction over the parties, and the amount be not such as is required to bring it into this court by appeal.

§ 908. *A wife divorced a mensa et thoro may acquire a domicile different from that of her husband, entitling her to sue in a circuit court for arrears of alimony.*

We proceed to show that it has jurisdiction. The constitution requires, to give the courts of the United States jurisdiction, that the litigants to a suit should "be citizens of different states." The objection in this case is, that the complainant does not stand in that relation to her husband, the defendant; in other words, it is a denial of a wife's right, who has been divorced *a mensa et thoro*, to acquire for herself a domiciliation in a state of this Union different from that of her husband in another state, to entitle her to sue him there by her next friend, in a court of the United States having equity jurisdiction, to recover from him alimony which he has been adjudged to pay to her by a court which had jurisdiction over the parties and the subject-matter of divorce, where the decree was rendered. We have already shown by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and by cases decided by this court; that the jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived. On that score, alone, the jurisdiction of the court in the case before us cannot be successfully denied.

But it was urged by the learned counsel who argued this cause for the defendant that husband and wife, although allowed to live separately under a decree of separation *a mensa et thoro*, made by a state court having competent jurisdiction, are still so far one person, while the married relation continues to exist, that they cannot become at the same time citizens of different states, within the meaning of the federal constitution, and therefore the court below had no jurisdiction. It was also said, for the purpose of bringing suits for divorces, they may acquire separate residences in fact; but this is an exception founded in necessity only, and that the legal domicile of the wife, until the marriage be dissolved, is the domicile of the husband, and is changed with a change of his domicile. Such, however, are not the views which have been taken in Europe generally, by its jurists, of the domicile of a wife divorced *a mensa et thoro*. They are contrary, too, to the generally-received doctrine in England and the United States upon the point.

In England it has been decided that, where the husband and wife are living apart, under a judicial sentence of separation, the domicile of the husband is not the domicile of the wife. *English Law and Equity Reports*, 9th vol.,

598; 2 Robertson, 545. When Mr. Phillimore wrote his treatise upon the law of domicile he said he was not aware of any decided case upon the question of the domicile of a wife divorced *a mensa et thoro*, but there can be little doubt that in England as in France it would not be that of her husband, but the one chosen for herself after the divorce. In support of his opinion he cites Pothier's *Introd. aux Coutume*, p. 4; Mercadie, in his commentary upon the French Code, vol. 1, p. 287; the French Code, tit. 111, art. 108; the Code Civile of Sardinia; and Cocher's Argument in the Duchess of Holsten's Case, *Ouvres*, 1, 2, p. 223.

Mr. Bishop, in his *Commentaries on the Law of Marriage and Divorce*, has a passage so appropriate to the point we are discussing that we will extract it entire. It is of the more value, too, because it comprehends the opinions entertained by eminent American jurists and judges in respect to the domicile of a wife divorced *a mensa et thoro*. He says, in discussing the jurisdiction of courts where parties sought a divorce abroad for causes which would have been insufficient at home, that "it was necessary to settle a preliminary question, namely, whether, for the purpose of a divorce suit, the husband and wife can have separate domiciles; that the general doctrine is familiar, that the domicile of the wife is that of her husband. But it will probably be found, on examination, that the doctrine rests upon the legal duty of the wife to follow and dwell with the husband wherever he goes.

"If he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, she must establish a domicile of her own, separate from her husband, though it may be, or not, in the same judicial locality as his. Courts, however, may decline to recognize such domicile in a collateral proceeding—that is, a proceeding other than a suit for a divorce. But where the wife is plaintiff in a divorce suit, it is the burden of her application that she is entitled, through the misconduct of her husband, to a separate domicile. So, *when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband.*" Section 728.

Chief Justice Shaw says, in *Harlean v. Harlean*, 14 Pick., 181, 185, the law will recognize a wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, *or so modified* as to establish separate interests, and especially a separate domicile and home. Otherwise the parties, in this respect, would stand upon a very unequal footing, it being in the power of the husband to change his domicile at will, but not in that of the wife.

The cases which were cited against the right of a wife, divorced from bed and board, to choose for herself a domicile, do not apply. *Donegal v. Donegal*, in 1 Addam's Eccl. Rep., 8, 19. That of *Shachell v. Shachell*, cited in *Whitcomb v. Whitcomb*, 9 Curt. Eccl. Rep., 352, are decisions upon the domicile of the wife when living apart from her husband by *their mutual agreement*, but not under decrees divorcing the wife from the bed and board of the husband. The leading case under the same circumstances is that of *Warrender v. Warrender*, 9 Bligh., 103, 104. In that case Lord Brougham makes the fact that the husband and wife were living apart by agreement, and not by a sentence of divorce, the foundation of the judgment. The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from

that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers, and places her in a situation to sue him for a divorce, *a mensa et thoro*, and to ask the court having jurisdiction of her suit to allow her from her husband's means, by way of alimony, a suitable maintenance and support. When that has been done it becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him wherever he may be found, or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to *carry the decree into a judgment there with the same effect that it has in the state in which the decree was given*. Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is. When it is not paid, the wife can sue her husband for it in a court of equity, as an incident of that condition which gave to her the right to sue him, by her next friend, for a divorce.

It was decided in the state of Massachusetts, as early as the year 1800, that there were circumstances under which it appears to be absolutely necessary for the wife to sue, as *for the recovery of alimony*. That case was the same, in its circumstances, as this with which we are dealing. The wife libeled for a divorce *a mensa et thoro*, on account of the extreme cruelty of her husband. The divorce was decreed; and the husband was ordered to pay to her alimony, in quarterly instalments. The wife afterwards brought an action against him for arrears. He demurred to the declaration; and judgment was given for her. *Wheeler v. Wheeler*, 2 Dana, H., 310.

The same has been held in other cases in that state. It is now established doctrine there, and in some of our other states. They hold that a decree for a divorce, with an allowance for alimony, is as much a judgment as if it had been obtained on the common law side of the court. Rogers, justice, in *Clark v. Clark*, 6 Watts & Serg., 85, places the right to recover arrears of alimony on the ground that the husband, after the decree for a divorce was rendered, had withdrawn himself from the jurisdiction of the court, to prevent him from being forced by attachment to pay the alimony which had been decreed to the wife. In the state of New York, a wife may file a bill against her husband for alimony; and it appearing that he had abandoned her without any support, and threatened to leave the state, the court, on the wife's petition, granted a writ of *ne exeat respublica* against him. *Denton v. Denton*, 1 Johns. Ch., 2, 364.

In South Carolina, where the court, having no power to grant divorces, decreed to a wife alimony, on her bill praying for that remedy only, and ordered the husband to give security for its payment, the sheriff, having taken him into custody, suffered him to escape; it was held that the wife might maintain, by her next friend, an action at law against the sheriff for the escape. Smith, justice, said: "It had been urged in the argument that this woman, being a *feme covert*, could not maintain the action by her next friend. If that argu-

ment were to prevail, there would be a failure of justice, which our law abhors, as there would be no means of enforcing a decree of a wife against her husband for alimony. The court of equity could not order a refractory husband to be attached, and the sheriff would let him go, if he thought proper; then, if the wife could not sue by her next friend, who could? The law provides no other course. And, upon this occasion, I would adopt the course of a very learned judge, 'if there is no precedent, I will make one.'"

In Ohio, a wife divorced *a mensa et thoro* may maintain ejectment for a lot of land, the use of which was allowed to her as alimony. In Virginia, it was said, in *Purcell v. Purcell*, 4 Hen. & M., 507, that the court of chancery has jurisdiction in all cases of alimony. In Maryland, the high court of chancery, from the earliest colonial times, exercised the jurisdiction to decree alimony, but not to grant divorces. This was done under the belief that it belonged to the high court of chancery, in the absence of ecclesiastical tribunals; and, in 1777, an act of assembly provided that the chancellor shall and may hear and determine all causes for alimony, in as full and ample a manner as such causes could be heard and determined by the laws of England, in the ecclesiastical courts there. Under that statute, alimony is granted to the wife whenever the English courts would be authorized to render a divorce from bed and board; but the court has no power to extend the remedy, and decree a divorce also.

The inherent jurisdiction of a court of equity to decree alimony has also been acknowledged in Alabama. In North Carolina, bills of equity by the wife against the husband, praying alimony, were sustained, from an early day, without question as to the lawfulness of the jurisdiction. Where such a decree has been made, whether done as an inherent power in equity to grant a decree for alimony, or as an auxiliary to enforce the payment of it as an incident of a divorce *a mensa et thoro*, there are no decisions, either in the English or American books, denying the wife's right to sue her husband, for arrears of alimony due, by her next friend. In some of the states she may do so, without the intervention of her next friend; but she cannot do that, as has been said before, in the courts of the United States having equity jurisdiction.

We think, also, that the cases which have been cited in this opinion are sufficient to show, whatever may have been the doubts in an earlier day, that a wife under a judicial sentence of separation from bed and board is entitled to make a domicile for herself, different from that of her husband, and that she may by her next friend sue her husband for alimony, which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill. In our best reflections we have been unable to come to a different result. The privileges allowed to a wife under such circumstances rest upon the facts that the separation is only grantable *propter Sævitiā*; that the alimony commonly allowed is no more than enough to give her a home and scanty maintenance, almost always necessarily short of that from which her husband has driven her; and that as a consequence she should be permitted to change her domicile, where she may live upon her narrow allowance with most comfort and the least mortification. Her right to sue her husband, by her next friend, for alimony already decreed, rests upon higher considerations, or upon legal principles which have been so well expressed by Chief Justice Shaw, as to her right to sue in the state of Massachusetts, that we will use his language, deeming it to be applicable in any other state in the American Union:

"After such a divorce the law of this commonwealth recognizes her right to

acquire and hold property, to take her own earnings to her own use, for the maintenance of herself and her children. She is deprived of the protection, and exempted from the control, of her husband. She may, by the decree of the court granting the divorce, and pursuant to the provision of the statute law of the commonwealth, be charged with the custody, and, consequently, with the support and maintenance of the children of the marriage. The reason, therefore, why a wife cannot sue or be sued without joining or being joined with her husband does not exist. The relation in which the divorce *a mensa et thoro* places the parties opposes a joinder. If it were necessary to join the husband as plaintiff, he might release her rights, by which she would be subjected to costs; if he might be joined as defendant, he might be made subject to her debts; both of which consequences are repugnant to the true relation of divided and separate interests in which the law by such a decree places them. Whilst the law thus recognizes the right of a woman so divorced to acquire and take the proceeds of her industry to her own use, it recognizes her power to make contracts; and if she could not sue and be sued, it would present the anomalous case in which the law recognizes a right without affording a remedy for vindicating it, and subjects a party to a duty without lending its aid to enforce it."

We do not deem it necessary to show, further than it has already been done in this opinion, that the equity side of the court was the appropriate tribunal for this cause. We have, however, verified the correctness and applicability of several of the cases cited in his argument by the counsel of the complainant to sustain that point, and deem them decisive.

§ 909. *A woman divorced a mensa et thoro in New York, and a citizen of that state by the laws thereof, is competent to sue in the circuit court of another state.*

The only point remaining for our determination is that which questions the complainant's right to pursue her remedy in the equity side of the district court of the United States in the state of Wisconsin. The facts are, that she married the defendant in the state of New York, the state then of her husband's domicile; that they lived there until the decree of separation was made; that she has retained it ever since as her domicile, but that the defendant, after the decree of separation was given, left her domicile in New York for another in the state of Wisconsin, in which he says that he has acquired a domicile. The complainant comes into court in the character of citizen of the state of New York. Mrs. Barber is recognized to be such by the laws of that state, and her *status* as a divorced woman *a mensa et thoro* by a court of competent jurisdiction in New York, and the rights of citizenship which she has under it there, are decisive of her right to sue in the courts of the United States, as that has been done in this instance. The citizenship of the defendant is admitted and claimed by him to be in the state of Wisconsin. His voluntary change of domicile from New York to Wisconsin makes him suable there. That might have been done in a state court in equity as well as in the district court of the United States; but she had a right to pursue her remedy in either. She has chosen to do so in a court of the United States, which has jurisdiction over the subject-matter of her claim to the same extent that a court of equity of a state has, and we think that the court below has not committed error in sustaining its jurisdiction over this cause, nor in the decree which it has made. We affirm the decree of that court, and direct a mandate to be issued accordingly.

TANEY, C. J., and JUSTICES DANIEL and CAMPBELL dissented.

Dissenting opinion by MR. JUSTICE DANIEL.

From several considerations, which to me appear essentially important, I am constrained to differ in opinion with the majority of the court in this case.

1. With respect to the authority of the courts of the United States to adjudicate upon a controversy and between parties such as are presented by the record before us. Those courts, by the constitution and laws of the United States, are invested with jurisdiction in controversies between citizens of different states. In the exercise of this jurisdiction, we are forced to inquire, from the facts disclosed in the cause, whether, during the existence of the marriage relation between these parties, the husband and wife can be regarded as citizens of different states? Whether, indeed, by any regular legal deduction consistent with that relation, the wife can, as to her civil or political *status*, be regarded as a citizen or person?

§ 910. *The marriage relation. Effect of divorce a mensa et thoro.*

By Coke and Blackstone it is said: "That by marriage the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife depend almost all the rights, duties and disabilities that either of them acquire by the marriage. For this reason, a man cannot grant anything to his wife, nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage." Co. Lit., 112; Bl. Com., vol. 1, p. 442. So, too, Chancellor Kent (vol. 2, p. 128): "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union."

Such being the undoubted law of marriage, how can it be conceived that pending the existence of this relation the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected and each *sui juris*? Now, the divorce *a mensa et thoro* does not sever the matrimonial tie; on the contrary, it recognizes and sustains that tie, and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection. The wife can have no claim to alimony but as wife, and such as arises from the performance of her duties as wife; the husband sustains no responsibilities save those which flow from his character and obligations as husband, presupposing the existence and fulfillment of conjugal obligations on the part of the wife. It has been suggested that by the regulations of some of the states a married woman, after separation, is permitted to choose a residence in a community or locality different from that in which she resided anterior to the separation, and different from the residence of the husband. It is presumed, however, that no regulation, express or special, can be requisite in order to create such a permission. This would seem to be implied in the divorce itself; the purpose of which is, that the wife should no longer remain *sub potestate viri*, but should be freed from the control which had been abused, and should be empowered to select a residence and such associations as would be promotive of her safety and her comfort. But whether expressed in the decree for separation, or implied in the

divorce, such a privilege does not destroy the marriage relation; much less does it remit the parties to the position in which they stood before marriage, and create or revive ante-nuptial, civil or political rights in the wife. Both parties remain subject to the obligations and duties of husband and wife. Neither can marry during the life-time of the other, nor do any act whatsoever which is a wrong upon the conjugal rights and obligations of either. From these views it seems to me to follow, that a married woman cannot, during the existence of the matrimonial relation, and during the life of the husband the wife cannot, be remitted to the civil or political position of a *feme sole*, and cannot therefore become a *citizen* of a state or community different from that of which her husband is a member.

§ 911. *Functions of government in reference to the domestic relations.*

2. It is not in accordance with the design and operation of a government having its origin in causes and necessities, political, general and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits, and affections or antipathies of the members of every household. If such functions are to be exercised by the federal tribunals, it is important to inquire by what rule or system of proceeding, or according to what standard, either of ethics or police, they are to be enforced. Within the range subjected to the political, general and uniform control of the federal constitution, there are numerous commonwealths, and within these are ordinances much more numerous and diversified, for the definition and enforcement of the duties of their respective members. Now, to which of these ordinances, or to which of these various systems of regulation, will the federal authorities resort as a source of jurisdiction or as a rule of decision, especially when it is borne in mind that it is only between members of different communities, persons legitimately subject to such separate rules of obligation or policy, that the tribunals of the federal government have cognizance; when, too, it is recollected that the federal government is clothed with no power to execute the laws of the states. The federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.

It has been suggested that by the decree for separation *a mensa et thoro*, the husband and wife have become citizens of different states, and that the allowance to the wife is in the nature of a debt, which, as a citizen of a different state, she may enforce against the husband in the federal courts. This suggestion, to my mind, involves two obvious fallacies. The first is the assumption that by the decree the wife is made a citizen at all, or a person *sui juris*, whilst yet she is wife, still bound by her conjugal obligations, the faithful observance of which, on her part, is the foundation of her claim to maintenance as wife, and which claim she would forfeit at any time by a violation of these obligations. Indeed, the form of her application is an acknowledgment that she is not *sui juris*, and not released from her conjugal disabilities and obligations, for she sues by *prochein ami*.

The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always de-

pendent upon the personal merits and conduct of the wife — merits and conduct which must exist and continue, in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who would not be permitted to enforce the payment of that to which it should be shown she had lost all just claim; and this inhibition, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future. The essential character, then, of this allowance, viz., its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The federal government has no such power; it has no commission of *censor morum* over the several states and their people.

§ 912. *The federal courts cannot take cognizance of cases of alimony.*

But, irrespective of the disability of the wife as a party, I hold that the courts of the United States, as courts of *chancery*, cannot take cognizance of cases of alimony. It has been repeatedly ruled by this court, that the jurisdiction and practice in the courts of the United States *in equity* are not to be governed by the practice in the state courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derived our knowledge of those principles. Such is the law as announced in the cases of *Robinson v. Campbell*, 3 Wheat., 212; of *The United States v. Howland*, 4 Wheat., 108; of *Boyle v. Zacharie*, 6 Pet., 648. It is repeated in the cases of *Story v. Livingston*, 13 Pet., 359, and of *Gaines v. Relf*, 15 Pet., 9. Now it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance. Upon questions of settlement or of contract connected with marriages, the court of chancery will undertake the enforcement of such contracts, but does not decree alimony as such, and independently of such contracts.

In *Roper on the Law of Baron and Feme* (vol. 2, p. 307), it is stated that Lord Loughborough, in a case in 1 Ves. Jr., 195, is reported to have said, that if a wife applied to the court of chancery upon a *supplicavit* for security of the *peace* against her husband, and it was necessary that she should live apart as incidental to that, the chancellor will allow her separate maintenance. That this passage has been quoted by Sir William Grant in 10 Ves., 397, and that the same opinion was advanced in the case of *Lambert v. Lambert*, 2 Brown's Parliamentary Cases, p. 26. "But," continues this writer, "there seems to be no reported instance of such a jurisdiction, and it would be inconsistent with the object and form of the writ of *supplicavit*;" and he concludes with the position that "the wife can only obtain a separate maintenance in the ecclesiastical courts where alimony is decreed to be paid during the pendency of any suit between husband and wife, and after its termination, if it ends in a sentence of separation on the ground of the husband's misconduct."

From the above views, it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United

States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded.

It has been said that, there being no ecclesiastical court in the United States, many of the states have assumed jurisdiction over the subjects of divorce and alimony, through the agency of their courts of equity. The answer to this suggestion is, first, that it concedes the distinction between the character and powers of these different tribunals. In the next place, it may have been that the jurisdiction exercised by the state courts may have been conferred by express legislative grant; or it may have been assumed by those tribunals, and acquiesced in from considerations of convenience, or from mere toleration; but whether expressly conferred upon the state courts, or tacitly assumed by them, their example and practice cannot be recognized as sources of authority by the courts of the United States. The origin and the extent of their jurisdiction must be sought in the laws of the United States, and in the settled rules and principles by which those laws have bound them.

POND *v.* VERMONT VALLEY RAILROAD COMPANY.

(Circuit Court for Vermont: 12 Blatchford, 280-298. 1874.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—The bill of complaint herein was filed by William P. Burrall (now lately deceased) and the other complainants, citizens and residents of the state of Connecticut, as stockholders in the Vermont Valley Railroad Company, a corporation created and organized by or under the laws of the state of Vermont. The bill seeks to restrain the execution of a lease of the railroad of the said corporation for twenty years from the 1st of June, 1875, to the Rutland Railroad Company (also a defendant), and to cancel such lease, if any have been executed (as is claimed and pretended), by the officers (Page, as president, and Williams, as treasurer) of the said Vermont Valley Railroad Company, or persons claiming to be such officers, and acting as such in the management thereof. This relief is sought upon various grounds, especially that such a lease is contrary to the expressed will of a majority of the stockholders; that it is in disregard of the rights and interests of all who are stockholders of that corporation only, and a fraud upon such rights; that the persons proposing and threatening to make such lease are former directors of the said corporation, claiming to hold over after the expiration of the term of office for which they were elected, and, being in the actual possession of the seal, books, papers and money of the corporation, and so having apparent control and management of its affairs, are, in fact, largely interested in the said Rutland Railroad Company, and officers thereof, and are thereby induced to sacrifice the interests of the Vermont Valley Railroad Company to those of the Rutland Railroad Company and of the Central Vermont Railroad Company (another defendant), with whom they are conspiring, to the prejudice of the stockholders of the Vermont Valley Railroad Company, to defeat their will and destroy their interests; and that so the acts of these pretended officers and directors are practically the transfer of valuable interests to themselves, in fraud of the stockholders last mentioned, and, so far as they can be deemed to have power to bind the Vermont Valley Railroad Company, in breach of trust. Their breach of trust is further alleged, in refusing to call a meeting of stockholders to elect directors, as by the charter they are bound to do, and thereby

expose the corporation to a forfeiture of the charter under the laws of Vermont.

Various other details are given in the bill, tending to show gross misconduct on the part of the defendants who are made such as directors or pretended directors of the said corporation, and whose acts are sought to be restrained. To show still further the illegality of the conduct of these defendants, former directors, and still acting as such, claiming to hold over, as before stated, and proposing and threatening to make the lease aforesaid, the bill also alleges that, before the period arrived at which the annual meeting of directors of the said corporation should regularly be held, and while they were in office under their prior election, the said defendants, by formal vote, forbade their officers from calling a meeting of the stockholders without their express direction, and further voted that the next annual meeting for the election of directors, which should regularly be held in June, 1873, should not be called until such day in December, 1873, as should be thereafter designated by them, and they thereafter designated no day for that purpose, thus defeating, or attempting to defeat, the right of stockholders to choose the directors and managers of their property, and perpetuate their own control of the affairs of the corporation, against the will of the stockholders, and with design to wrongfully and illegally execute the lease aforesaid of the property of the company, against the will and the interests of the stockholders of the corporation; and that, in an endeavor to defeat such mismanagement, a majority of the stockholders procured the president, notwithstanding the vote of such directors, to call a meeting of stockholders for an election of directors, which meeting of stockholders was held, and a new board of directors was chosen at such meeting, but the said former directors deny the validity of such election, still retain possession and management of the affairs of the corporation, and persist in their determination to execute such lease.

Other particulars are stated in the bill, but this is probably sufficient to indicate the nature of the subject of complaint and grievance. The bill then alleges that the new board of directors, whom the complainants aver to be the legal board of directors of the corporation, have been applied to by the complainants, and have been requested by them, by suit or otherwise, to prevent the execution of the said lease, and to procure the cancellation thereof, if any has been executed, and to prevent the transfer or other wrongful disposition of the road and property of the company, as threatened and intended by the said former directors so claiming to hold over as aforesaid, and to take measures, by suit or otherwise, to recover possession of the said road and property, in accordance with the right of the said Vermont Valley Railroad Company thereto; but that, although the said newly elected board of directors concur with the complainants in their views, and admit that any such lease which may have been executed is invalid, and ought to be canceled, and that the execution of a lease, as threatened and attempted, would be wrongful, and in violation of the legal rights of said Vermont Valley Railroad Company, and of the complainants and the other stockholders thereof, yet said board of directors, in violation of their duty as such, in answer to said requests of the complainants, wholly decline to act in accordance therewith, or with either of them, and say that, in consideration of the many obstacles in the way of obtaining in the state courts the relief aforesaid, they decline and refuse to take any further proceedings, by suit or otherwise, to protect the property of said company, or the interests of the stockholders thereof, from the wrongs and threatened

wrongs in the said bill of complaint set forth. The prayer of the bill is, that the said pretended lease claimed to have been executed may, if in existence, be decreed to be given up and canceled; and that the defendants Page, Butler, Chase, Prout, Williams, Slate, and the Vermont Valley Railroad Company be enjoined from executing, or causing to be executed, any lease of the said railroad, unless authorized by a legal vote of the stockholders; that the persons last named be required to surrender the property to the said railroad company or to a receiver, and give up the books, papers, common seal and money of the company, either to the said newly elected board of directors or to a receiver; and that a receiver be appointed, and for such other and further relief as to equity and good conscience may "obtain."

The defendants to this bill, sought to be enjoined as last mentioned, are members of the said former board of directors, alleged to illegally hold over in possession, and claiming and threatening as above stated, and are Peter Butler and George B. Chase, citizens of Massachusetts, and John B. Page, John Prout, James H. Williams and George Slate, citizens of Vermont. Gouverneur Morris, a citizen of New York, is also made a defendant, he being a member of both boards, and alleged to have dissented from the action and proposed action of such former board. The defendants who are alleged to constitute the said newly elected and legal directors, but who refuse to institute proceedings for the protection of the stockholders, are Silas M. Waite, William H. Rockwell, Junior, Frederick A. Nash and Frederick Billings, citizens of the state of Vermont, and Daniel L. Harris, a citizen of the state of Massachusetts.

To this bill the defendant John Prout interposed a plea to the jurisdiction of the court. The averments therein are, that the defendants the Vermont Valley Railroad Company, and the defendants John B. Page, James H. Williams and George Slate, are citizens of Vermont; that Silas M. Waite, William H. Rockwell, Frederick A. Nash and Frederick Billings, named defendants, are also citizens of Vermont, and their respective rights and interests in the subject of controversy, and embraced in said bill, are identical with, and the same as, those of the said complainants, and they seek the same relief and decree in said proceeding as the said complainants, and were made defendants in said bill for the purpose of giving this court a colorable and false jurisdiction of said bill and the parties aforesaid, when, in truth and in fact, the said Waite, Rockwell, Nash and Billings, as well as said Morris and Harris, are complainants in said bill, and aiding in the prosecution thereof. This plea the complainants set down for argument, without any replication thereto, and they are, therefore, to be taken to admit all material and issuable facts stated therein.

The defendant John B. Page, after appearing and answering the bill of complaint, made a motion to dismiss the suit upon the ground that this court has no jurisdiction, in substance repeating the plea of the defendant Prout, and alleging that some of the defendants conspired and confederated with the complainants for the fraudulent purpose of giving this court a false jurisdiction of said bill or cause, and that such last named defendants were made defendants for the purposes of jurisdiction, without reference to their real relation, as parties, to the said bill and the subject-matter thereof, and that the refusal of the so-called new board of directors to bring suit was only for the purpose of giving the court jurisdiction, and is a fraud upon the court. In support of this motion the said Page examined witnesses, and their affidavits, claimed to establish these grounds of the motion, are produced..

The case was heard both upon the plea and upon the motion; and, on the

argument, it was also urged that the want of jurisdiction was apparent upon the face of the bill of complaint, inasmuch as it appears thereby that some of the defendants are not citizens of the state in which the suit is brought, the defendants Butler, Chase and Harris being citizens of the state of Massachusetts, and the defendant Morris being a citizen of the state of New York.

It is not insisted, and cannot be successfully claimed, that the matters complained of herein are not of equity cognizance; or that a court having general jurisdiction in equity has no jurisdiction, at the instance of stockholders, to restrain a corporation or those engaged in the control and management of its affairs, from acts tending to the destruction of its franchises, or violations of the charter, and from misuse or misappropriation of the corporate powers or property, or other acts prejudicial to the stockholders, amounting to a breach of trust on the part of the managers. *Dodge v. Woolsey*, 18 How., 331 (CORP., §§ 565-73), and numerous cases cited in the opinion in that case; and see *Bacon v. Robertson*, 18 How., 480, 488; *Smith v. Swormstedt*, 16 How., 288. The questions here do not, therefore, pertain to the general jurisdiction of courts of equity, but to the question whether the jurisdiction of the circuit court of the United States is so limited that, for other reasons than the nature of the controversy, it has no jurisdiction of this cause.

It is true that counsel insisted that the suit was, in part at least, to determine which of two boards of directors of the Vermont Valley Railroad Company is the legally elected board of directors, and entitled to the management of its affairs. That, however, is not the object of the bill; it is not the relief prayed, and, although it may not be possible to do all that is prayed for, without incidentally considering that question, such consideration would only be incidental, and it is not even essential to the determination of the principal question, whether the defendants who constitute the former board of directors, and the two corporations who are made defendants, shall be permitted to carry out the alleged scheme to give a lease of the Vermont Valley Railroad for twenty years, under the circumstances alleged in the bill of complaint. To justify interference by stockholders by a suit to restrain a wrong threatened, or to obtain redress for the corporation, it is necessary that it should appear that the directors of the corporation are either themselves the wrong-doers, or that they refuse to prosecute for that purpose; and in the last named case such averment involves refusal by the legal board of directors; and where, as in this case, one set of defendants are alleged to be in the commission of the wrong, and there be another set who claim to be the legal directors, who, nevertheless, refuse to prosecute for the redress or protection of the rights of the stockholders, the averment that the last named are, in fact, the legal directors does not, even if incidentally necessary, change the nature of the controversy. The wrong threatened or committed, and the prevention or redress of the wrong, are still the principal subjects of the controversy, and within the jurisdiction of a court of equity. I repeat, therefore, that the question here is, whether, for reasons other than the nature of the controversy, the jurisdiction of the circuit court of the United States does or does not embrace this case.

§ 913. *It is not fatal to federal jurisdiction that it appears on the face of the bill that one of the defendants is a citizen of a third state.*

1. Is it fatal to the jurisdiction that it appears on the face of the bill, that, while some of the defendants are citizens of the state of Vermont, others of them are citizens of the state of Massachusetts, and one a citizen of the state of New York? Two clauses of the judiciary act of 1789 (1 U. S. Stat. at

Large, 78, § 11) are relied upon to show that the circuit court has no jurisdiction of such a case, such jurisdiction being confined to cases in which jurisdiction is affirmatively conferred by statute—*first*, the clause which gives jurisdiction when “the suit is between a citizen of the state where the suit is brought and a citizen of another state;” and *second*, the clause of the same section which declares, in substance, that no civil suit shall be brought against any inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of the service of the writ.

The question whether, where the suit was, in fact, against a citizen of the state in which the suit is brought, and by a citizen of another state, and for a matter properly cognizable by the circuit court, its jurisdiction of the action failed if a party having an interest in the subject, making him a necessary party, resided in still another state, was, under the act of 1789, one of much interest. Confessedly the constitution of the United States did not require such a limitation of the jurisdiction. Cases might often arise in which it was of the utmost importance to citizens of one state to bring suit in the United States court in another state, where the matter in controversy arose or the property or fund in question was situated, and where the principal defendants resided. When such a suit was brought against the defendants residing in the state where it was brought, was there a want of jurisdiction of the action itself if it appeared that some other person, citizen of a third state, was a necessary party? I think not. The court might not be competent to make a decree in the absence of such party, but that would be, not because the court was not competent to take jurisdiction of the action, but because it had not jurisdiction of all the *parties* to the action which were necessary before the court could act upon the subject in controversy. The two clauses in the act of 1789, read together, show precisely what congress intended. There must be a suit between a citizen of the state in which the suit is brought and a citizen of another state. If a citizen of a third state is a necessary party, you cannot compel his appearance by serving him with process unless he is found in the district where the suit is pending, or unless he waives his privilege and voluntarily appears. The supposed defect of jurisdiction in such case pertains to jurisdiction of the person and not to jurisdiction of the action; and it is not for a citizen of Vermont, who is rightly proceeded against, to say that the court has no jurisdiction of the action because another person, who is defendant with him, but who appears and answers to the merits without objection, resides in some other state. The object of the apparent limitation was not to prevent a citizen of Vermont (properly sued in his own district) from having a citizen of some other state joined with him as defendant; but, so far as defendants were included, it was to protect citizens from being sued out of the district in which they reside or are found to be served. It does not prevent their voluntarily appearing and submitting to the jurisdiction in such a case.

I am aware that in numerous cases cited by counsel on the argument, observations are made, by analogy at least, in conflict with this view of the proper construction of the act of 1789. See *Strawbridge v. Curtiss*, 3 Cranch, 267 (§ 881, *supra*); *New Orleans v. Winter*, 1 Wheat., 91 (§ 900, *supra*); *Cameron v. McRoberts*, 3 Wheat., 591; *Conolly v. Taylor*, 2 Pet., 564 (§ 899, *supra*); *R. R. Bank v. Slocomb*, 14 Pet., 60; *Ohio & Miss. R. Co. v. Wheeler*, 1 Black, 286 (§§ 1351–52, *infra*); *Wood v. Davis*, 18 How., 467; *McDonald v. Smalley*, 1 Pet., 620 (§§ 1219–20, *infra*); *Scott v. Sandford*, 19 How., 393; *Coal Co. v.*

Blatchford, 11 Wall., 172 (§§ 897, 898, *supra*); Sewing Machine Companies' Case, 18 Wall., 553. But no decision of the supreme court was cited, and I have found none, holding the precise point that, when the suit is brought in one state where defendants therein reside, and another defendant living in another state appears and answers without objection, such first named defendants can object that the court has, on that ground, no jurisdiction. On the contrary, the view which I have given of the true construction of the act of 1789 is affirmed by Chief Justice Marshall, and acted upon by the supreme court of the United States in *Russell v. Clark*, 7 Cranch, 69, where the complainant lived in South Carolina and brought suit in Rhode Island in the circuit court of the United States, against citizens of Rhode Island. That court dismissed the bill. The supreme court held certain assignees or trustees, residing in the state of New York, necessary parties to the suit, but reversed the judgment of the circuit court, and remanded the case to give the complainants the benefit of the possible willingness of those assignees or trustees to come in as parties and waive their privilege, and give the court jurisdiction of their persons, which alone was deemed requisite to the complete jurisdiction of the court over the whole matter. "It is possible," says the opinion, "that they may consent to make themselves parties in this cause;" and the court reversed the decree and remanded the cause, with leave to the complainant to make them parties. The distinguished chief justice and his associates were not ignorant of the distinction between jurisdiction of the person and jurisdiction of the action, or of the rule that a party may waive objection to jurisdiction of his person, but that consent cannot confer jurisdiction of the action itself. The court would not have remanded that cause when the immediate and direct effect of making those citizens of New York defendants would be to defeat the jurisdiction of the court. That case, therefore, is a direct decision of the supreme court in support of the views above expressed.

But whatever doubt may be supposed to arise on this point out of the observations found in other cases in some degree analogous, the construction given by the supreme court to the act of February 28, 1839 (5 U. S. Stat. at Large, 321, § 1), is conclusive in support of the jurisdiction of the court in such case. In *Jones v. Andrews*, 10 Wall., 327 (§§ 883–886, *supra*), the bill was filed by a citizen of Georgia in the circuit court of the United States for West Tennessee, against citizens of Tennessee and a citizen of New York. The latter was not only a necessary party, but in interest he was the principal party to be affected by the relief sought. The circuit court dismissed the bill for want of jurisdiction upon grounds like those urged in this case. The supreme court reversed the decree. In the opinion of the court by Mr. Justice Bradley, it is said: "The act of February 28, 1839, by implication, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear therein. The suit can proceed against them if they voluntarily appear, or without them if they are not necessary parties. . . . In this case, Andrews *was* a necessary party, and he was not a resident of the district and was not served with process, but he did voluntarily appear. . . . After this, the question of jurisdiction over the person was at an end, and the decree of the circuit court dismissing the bill for want of jurisdiction must be reversed." This decision meets the precise point raised by the defendants Prout and Page, that, upon the face of the bill, the court has no jurisdiction, because some of the persons made defendants do not reside in the district of Vermont, and establishes that, if the court has obtained or shall obtain due jurisdiction of

their persons, the jurisdiction of the court cannot be questioned on the ground so objected. Some of these defendants have appeared and answered to the merits, and the other may do so if he sees fit, if he has not already appeared.

§ 914. *In a suit by stockholders against the company, it is not a sufficient plea that some of the defendants have the same interests with complainants, provided that the court has a real ground of jurisdiction against those defendants.*

2. I come, next, to consider the case upon the plea of the defendant Prout. No facts alleged in that plea show want of jurisdiction. Undoubtedly, material and issuable facts averred in a plea, when the complainant sets the case down for a hearing on the bill and plea, are to be taken as admitted. The facts averred in this plea are, that certain of the defendants are residents of the state in which the suit is brought; that their respective rights and interests in the subject of controversy embraced in the bill are identical and the same as those of the complainants, and they seek the same relief and decree, and they were made defendants for the purpose of giving this court a colorable and false jurisdiction, and that in fact they are complainants in said bill, and aiding in the prosecution thereof. Divesting these averments of what is false and inconsistent, in the terms used, with the plea itself, namely, that those defendants "seek the same relief," etc., and that those defendants "are, in fact, complainants," and giving to these loose and inconsistent averments their only proper meaning, the plea amounts to this—the defendants named have the same interest as the complainants; they wish that the relief sought may be granted; they are aiding in the prosecution of the suit, and they are made defendants for the purpose of giving the court jurisdiction. If, notwithstanding the facts stated, the court has jurisdiction, then it is to no useful purpose that the defendant Prout calls it, in the plea, false and colorable. The jurisdiction is real, if it exists.

The defendants named are made defendants not by reason of their interest in the railroad company as stockholders, but by reason of their alleged official character as directors, refusing to perform their duty by bringing suit to redress or prevent the wrong done or threatened. The plea in no wise denies such refusal, nor states any fact in avoidance of the right of a stockholder to prosecute where those whose duty it is to protect the corporation and its stockholders refuse; and, certainly, it cannot prevent or defeat the right of the complainants to sue, if it be true that such directors refused to bring suit in order to drive the complainants to bring suit themselves for their own protection, which, however, is not averred in the plea. If the grounds of jurisdiction exist, the motives which led thereto are not material. This is illustrated by the removal of a citizen from one state to another. If such apparent change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only a transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the state of actual residence, it may not avail; but, where there is an actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States. So, also, those defendants, upon such refusal by them to prosecute, were necessarily made defendants. Without that, the complainants, as mere stockholders, could not sue at all in any court, for a cause of action arising out of such refusal. With that, the complainants have the right to sue in any court having jurisdiction. If they desired to come into the federal court, they had the right to do so, not-

withstanding such recusant directors lived in Vermont; and they had no alternative but to make them defendants.

Consistently with the fact standing undenied, that those defendants refused to be plaintiffs, the purpose to state the facts in their bill which should show jurisdiction in the federal court, and make them defendants, in order that such court should have jurisdiction of the action and of all necessary parties, is lawful and proper and in no wise defeats that jurisdiction; and, surely, the fact that the rights and interests of those defendants, as stockholders, are the same as the rights and interests of the complainants, does not affect the jurisdiction. As already suggested, they are not proceeded against as stockholders, nor are they made parties in respect of any interest they have as stockholders. The other defendants, who compose the alleged former board of directors, have also the same rights and interests *as stockholders*, in the Vermont Valley Railroad Company and its management, as have the complainants, and so have all other stockholders in the company. All may not agree in their judgment of what is wise, best or legal, and the interest of some may be overbalanced by their interest in other railroads, but, as stockholders of this company, all are, in fact, in the like interest. But this does not destroy the right of one or more of the stockholders, otherwise competent, to sue in the federal courts. Nor can the desire or wish of such other stockholders, that the complainants may be successful, defeat such jurisdiction. The case of *Dodge v. Woolsey*, in the supreme court of the United States (18 How., 331; CORP., §§ 565–573), seems to me conclusive upon this aspect of the present case. There, as here, the directors refusing to sue resided in the same state with the other defendants. There, as here, those directors were of the same opinion with the complainant, that a wrong to the corporation had been done and was further threatened, and that the acts against which the complainant sought to protect the corporation were illegal. They, nevertheless, refused to sue, and their reason for refusal was identical with that here alleged, and neither in that case nor this did it appear that their refusal was not actual, or that they were not sincere in their reasons therefor. The court, in that case, declare most fully the jurisdiction of the federal court, and show the necessity of such jurisdiction, notwithstanding it was, on the face of the bill, true, as is alleged in the plea in the present case, that the interests and wishes of those defendants were the same as the rights, interests and wishes of the complainant, and that such defendants were in full accord with the complainant, as a stockholder in the corporation. That case shows, also, that the complainant was not bound to make stockholders residing in the state in which the suit was brought parties, and, inferentially, that a purposed omission to make them parties, in order that the jurisdiction of the federal court might not be defeated, did not defeat the jurisdiction. The court say of the right of the stockholder to sue in such cases: “Courts of equity have jurisdiction over corporations, at the instance of *one* or *more* of their members;” and of the particular case then before them, at the instance of a single stockholder, the complainant, Woolsey: “Besides, it was not his interest alone which would be affected by the result. Hundreds, citizens of the state of Ohio and citizens of other states, are concerned in the question.”

The suit being brought in Ohio, if the complainant had made such other stockholders parties defendant, upon allegations adapted to charge them, it would not have deprived the court of jurisdiction. His omission to make them

parties at all did not defeat the jurisdiction; and, if it had been alleged and proved that the reason he did not join with them as complainants was his purpose to give the federal court jurisdiction, the fact would have been wholly immaterial, because he had the right to prosecute the suit himself, without making them parties. So, here, the complainants had the right to prosecute; and if making stockholders who reside in Vermont parties plaintiff with them would deprive them of access to the federal courts, they had a right to sue by themselves and for that precise reason. The fact that all other stockholders have the same interest, no more destroys the jurisdiction than it did in *Dodge v. Woolsey*. I am, therefore, of the opinion that nothing alleged in the plea of the defendant Prout defeats the jurisdiction of this court, and that such plea should, therefore, be held insufficient. The complainants are, therefore, entitled to a decree notwithstanding such plea.

3. As to the motion to dismiss the bill, which is made by the defendant Page. So far as it was urged upon grounds arising on the face of the bill itself, what is firstly above suggested is a sufficient answer to the motion. The motion further proceeds mainly upon the grounds stated in the plea of the defendant Prout, and these have been above secondly considered, and my conclusion is adverse to the motion. If the motion be disposed of upon the proofs submitted in support of the grounds alleged therefor, I am constrained to say that those proofs do not satisfactorily establish such collusion or conspiracy or attempted fraud on the jurisdiction as was claimed on the argument. A bill ought not to be dismissed on such grounds without clear proof. The complainants may be remediless, when the directors do, in fact, refuse to sue, and such refusal is sincere, unless jurisdiction be entertained.

§ 915. *When a defendant wishes to contest the jurisdiction on facts not appearing upon the bill, he must do so by plea, and not by motion to dismiss.*

Besides, so far as the motion proceeds on the allegation of facts not appearing on the face of the bill, but sought to be brought to the attention of the court by a defendant who has submitted to the jurisdiction of the court by answering to the merits, the motion ought not to be entertained. Where it appears by the complainant's own showing in his bill, that the court has no jurisdiction of the action, a defendant served with process may demur to the bill on that ground, and there are precedents for a summary motion to dismiss the bill. In such case the question arises on the record, and can be reviewed on an appeal or writ of error, bringing the record before an appellate tribunal. But where the bill shows apparent jurisdiction, and a defendant desires to contest the allegations, or introduce new allegations in avoidance of the jurisdiction, it should be done by plea to the jurisdiction, which will bring upon the record the allegations and the finding of facts thereupon, and not by a collateral proceeding, forming no part of the record proper, and not regularly brought before the appellate tribunal by the appeal or writ of error.

This is not inconsistent with the principle, that, whenever, in the progress of the cause, it appears that the court have no jurisdiction thereof, and cannot make a valid decree, the court will decline to act in the premises. The modes of judicial proceeding prescribe in what manner such facts must be made to appear by a party urging the objection. As to him, if he does not raise the objection in a proper form, but appears and answers to the merits, he has no cause of complaint, that the court do not afterwards receive from him the suggestion in an informal and summary manner. The record should show the question by proper allegation and issue thereupon. No doubt the court has

power to protect itself against imposition and fraud. But parties should place their defenses on the record in a form adapted to show on what they rely, and in a form in which, on a review of the record, the appellate court may have the proceedings before it without searching for collateral and incidental proceedings, called out-branches of the record. This is in conformity with the opinion of the supreme court in *Wickliffe v. Owings*, 17 How., 47, to the effect that when the averments in the bill show jurisdiction, the defendant, if he wish to deny it, must show want of jurisdiction by plea controverting those averments; and also in harmony with the opinion of the supreme court in *Coal Company v. Blatchford*, 11 Wallace, 172 (§§ 897, 898, *supra*), to the same effect; and in *Jones v. League*, 18 How., 81, the court hold that, when the facts creating jurisdiction are disputed, the facts must be pleaded in abatement, and this must be done in the order of pleading, as at the common law. See, also, *Wickwire v. The State*, 19 Conn., 477.

It follows that the motion must be denied with costs. Counsel will prepare the proper orders, overruling the plea of the defendant Prout, and denying the motion of the defendant Page, in conformity with this opinion.

GAINES v. FUENTES.

(2 Otto, 10-26. 1875.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—This was an action to annul the will of Daniel Clark, and to recall the decree admitting it to probate. The action was brought in the second district court for the parish of Orleans. Plaintiff in error applied under the act of March 2, 1867, to have the case removed into the circuit court, on the ground that from local prejudice she could not obtain justice in the state court. The application was refused on the ground that the federal court had no jurisdiction of a controversy which had for its object the annulling of a decree admitting a will to probate. This question now comes up on a writ of error from this court.

Opinion by MR. JUSTICE FIELD.

In the view we take of the application of the plaintiff in error to remove the cause to the federal court, no other question than the one raised upon that application is open for our consideration. If the application should have been granted, the subsequent proceedings were without validity; and no useful purpose would be subserved by an examination of the merits of the defense, upon the supposition that the state court rightfully retained its original jurisdiction. The action is in form to annul the alleged will of 1813 of Daniel Clark, and to recall the decree by which it was probated; but as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiff in error, the action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is, in fact, an action between parties; and the question for determination is, whether the federal court can take jurisdiction of an action brought for the object mentioned between citizens of different states, upon its removal from a state court.

§ 916. *Congress may, under the constitution, give to the federal courts jurisdiction in all controversies, of whatever nature, between citizens of different states.*

The constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different states," as well as to cases arising under the constitution, treaties and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all state authority. Such are cases in which the United States are parties,—cases of admiralty and maritime jurisdiction, and cases for the enforcement of rights of inventors and authors under the laws of congress. The *Moses Taylor*, 4 Wall., 429; *Railway Co. v. Whitton*, 13 id., 288 (§§ 585–588, *supra*). But, in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests entirely with congress to determine at what time the power may be invoked, and upon what conditions,—whether originally in the federal court, or after suit brought in the state court; and, in the latter case, at what stage of the proceedings,—whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error. The judiciary act of 1789, in the distribution of jurisdiction to the federal courts, proceeded upon this theory. It declared that the circuit courts should have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, involving a specified sum or value, where the suits were between citizens of the state in which they were brought and citizens of other states; and it provided that suits of that character by citizens of the state in which they were brought might be transferred, upon application of the defendants, made at the time of entering their appearance, if accompanied with sufficient security for subsequent proceedings in the federal court. The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the federal and state courts since the establishment of the government. But the limitation of the original jurisdiction of the federal court, and of the right of removal from a state court, to a class of cases between citizens of different states involving a designated amount, and brought by or against resident citizens of the state, was only a matter of legislative discretion. The constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended; and congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

§ 917. *The act of March 2, 1867, increases the facilities for removing cases into the federal courts, and covers every possible case involving controversies between citizens of different states, when the amount exceeds \$500.*

As we have had occasion to observe in previous cases, the provision of the constitution, extending the judicial power of the United States to controversies between citizens of different states, had its existence in the impression that state attachments and state prejudices might affect injuriously the regular administration of justice in the state courts. It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election of courts before suit; and, when the suit was brought in a state

court, a like election to the defendant afterwards. *Railway Co. v. Whitton*, 13 Wall., 289 (§§ 585–588, *supra*). But the experience of parties immediately after the late war, which powerfully excited the people of different states, and in many instances engendered bitter enmities, satisfied congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided by the act of March 2, 1867 (14 Stat., 558), greater facilities for the removal of cases involving controversies between citizens of different states from a state court to a federal court, when it appeared that such influences existed. That act declared, that where a suit was then pending, or should afterwards be brought, in *any* state court, in which there was a controversy between a citizen of the state in which the suit was brought and a citizen of another state, and the matter in dispute exceeded the sum of \$500, exclusive of costs, such citizen of another state, whether plaintiff or defendant, upon making and filing in the state court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court, might, at any time before final hearing or trial of the suit, obtain a removal of the case into the circuit court of the United States, upon petition for that purpose, and the production of sufficient security for subsequent proceedings in the federal court. This act covered every possible case involving controversies between citizens of the state where the suit was brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of \$500. It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states? and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination.

§ 918. *If jurisdiction over this case did not exist in the circuit court before the act of March 2, 1867, it was given by that act.*

With these provisions in force, we are clearly of opinion that the state court of Louisiana erred in refusing to transfer the case to the circuit court of the United States upon the application of the plaintiff in error. If the federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the parish court of Orleans, it was invested with the necessary jurisdiction by this act itself so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies from a state court to a federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in *Smith v. Rines*, cited from 2 Sumn., in support of the position that such cases are only liable to removal from the state to the circuit court as might have been brought before the circuit court by original process, applied only to the law as it then stood. No case could then be transferred from a state court to a federal court, on account of the citizenship of the parties, which could not originally have been brought in the circuit court.

§ 919. *The present suit is in all essentials a suit in equity, and not a matter of probate merely.*

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muni-

ment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states.

Nor is there anything in the decisions of this court in the case of *Gaines v. New Orleans*, reported in the 6th of Wallace (642), or in the case of *Broderick's Will*, reported in the 21st of Wallace (503), which militates against these views. In *Gaines v. New Orleans*, this court only held that the probate could not be collaterally attacked; and that, until revoked, it was conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a federal as well as in a state court, if jurisdiction of the parties was once rightfully obtained.

In the case of *Broderick's Will*, the doctrine is approved, which is established both in England and in this country, that, by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the federal courts sitting in the states where such statutes exist will also entertain concurrent jurisdiction in a case between proper parties.

§ 920. *It is true that the federal courts have no probate jurisdiction.*

There are, it is true, in several decisions of this court, expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the judiciary act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the federal court, does, in our judgment, by that fact, invest that court with all needed jurisdic-

tion to adjudicate finally and settle the controversy involved. It follows, from the views thus expressed, that the judgment of the supreme court of Louisiana must be reversed, with directions to reverse the judgment of the parish court of Orleans, and to direct a transfer of the cause from that court to the circuit court of the United States, pursuant to the application of the plaintiff in error.

Judgment reversed.

Dissenting opinion by MR. JUSTICE BRADLEY, SWAYNE, J., concurring.

The question whether the proceeding in this case, which was instituted in the state court of probate, was removable thence into the circuit court of the United States, depends upon the true construction of the acts of congress which give the right of removal. The first act on this subject was the twelfth section of the judiciary act of 1789, which declares "that, if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state" [and certain conditions and security specified in the act be performed and tendered], "it shall be the duty of the state court to . . . proceed no further in the cause, . . . which shall then proceed in the United States court in the same manner as if it had been brought there by original process." This twelfth section cannot be entirely understood without reference to the preceding section, by which the original jurisdiction of the circuit court was conferred. That section declares that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state; . . . but that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

§ 921. "*Suits of a civil nature at common law or in equity.*"

Now the question arises, What proceedings are meant by the phrase, "suits of a civil nature at common law or in equity," in the latter section, conferring original jurisdiction, and the phrase, "a suit," in the former section, giving the right of removal? A "suit of a civil nature at common law or in equity" may, by virtue of the eleventh section, be brought in a circuit court if the parties are citizens of different states, and one of them is a citizen of the state where the suit is brought. "A suit" commenced in any state court by a citizen of that state against a citizen of another state may be removed into the circuit court; and, when removed, it is directed that "the cause shall then proceed in the same manner as if it had been brought there by original process." By this act, therefore, any "suit" which could have been originally brought in the circuit court may be removed there from the state court, if brought by a citizen of the state against a citizen of another state; and it was always supposed that, if it could not be originally brought there, it could not be removed there, because it is to be proceeded in "as if it had been brought there by original process." Mr. Justice Story, in a case before him decided in 1836, in reference to this section, used the following language: "It is apparent, from the language of the closing passage of the section above quoted, that it contemplates such cases, and such cases only, to be liable to removal as might under the law, or at all events under the constitution, have been brought before the circuit

court by original process." Judge Conkling, in his "Treatise on the United States Courts" (a work long used with approbation by the profession), says: "It is obvious, from the language of the twelfth section of the judiciary act, that it was not intended by it to extend the jurisdiction of these courts over causes brought before them on removal beyond the limits prescribed to their original jurisdiction; and such, as far as it goes, is the judicial construction which has been given to this section." Congress undoubtedly might authorize, and in special cases has authorized, the removal of causes from state courts to the United States court which could not have been originally brought in the latter. An instance of the kind is found in this very twelfth section in a special case where a suit respecting the title to land has been commenced in a state court between two citizens of the same state, and one of the parties, before the trial, states to the court by affidavit that he claims title under a grant from another state. In *Bushnell v. Kennedy*, 9 Wall., 387 (§§ 1181-82, *infra*), however, this court held that a citizen of one state sued in another state by a citizen thereof on a claim which had belonged to a citizen of the latter state, and had been assigned to the plaintiff, might have the cause removed to the circuit court of the United States, although, perhaps, it might not have been originally cognizable therein; but it still remains to determine what kinds of controversies are intended by the act.

Now the phrase, "suits at common law and in equity," in this section, and the corresponding term, "suit," in the twelfth, are undoubtedly of very broad signification, and cannot be construed to embrace only ordinary actions at law and ordinary suits in equity, but must be construed to embrace all litigations between party and party which in the English system of jurisprudence, under the light of which the judiciary act, as well as the constitution, was framed, were embraced in all the various forms of procedure carried on in the ordinary law and equity courts, as distinguished from the ecclesiastical, admiralty and military courts of the realm. The matters litigated in these extraordinary courts are not, by a fair construction of the judiciary act, embraced in the terms "suit at law or in equity," or "suit," unless they have become incorporated with the general mass of municipal law, and subjected to the cognizance of the ordinary courts.

Now, it is perfectly plain that an application for the probate of a will is not such a subject as is fairly embraced in these terms. This court has in repeated instances expressly said that the probate of wills and the administration of estates do not belong to the jurisdiction of the federal courts under the grant of jurisdiction contained in the judiciary act; and it may, without qualification, be stated, that no respectable authority, in the profession or on the bench, has ever contended for any such jurisdiction. Whether, after a will is proposed for probate, and a *caveat* has been put in against it, and a *contestatio litis* has thus been raised, and a controversy instituted *inter partes*, congress might not authorize the removal of the cause for trial to a federal court, where the parties *pro* and *con* are citizens of different states, is not now the question. The question before us is, whether congress has ever done so; and it seems to me that it has not. The controversy is not of that sort or nature which belongs to the category of a suit at law or in equity, as those terms were used in the judiciary act.

It is not intended to say that the validity of a will may not often come in question, and require adjudication, in both a court of law and a court of equity. It does come in question frequently. *Devisavit vel non* is an issue frequently

made at law, and directed in equity; and there are special cases, also, where the validity of a will may be investigated in equity, as shown in the case of Broderick's Will, lately decided by this court. But that is a very different thing from hearing and determining a question of probate, even when the question becomes a litigated one. This question belongs to special courts, having a special mode of procedure, and is subject to rules that took their origin in the ecclesiastical laws; and it certainly cannot be seriously contended that, if the federal courts have no jurisdiction of the probate of wills, they nevertheless have jurisdiction of proceedings to revoke the probate. This would be to assume the whole jurisdiction of the subject.

The proceeding in the case below was one to revoke the probate of a will; simply that, and nothing more. It was not merely to set aside the will so far as it affected the defendants in error. Not at all. It brought up the question of probate under a form of proceeding peculiar to the course of justice in Louisiana, called an action of nullity. This action may undoubtedly be entertained in the federal courts in that state; at all events, to set aside their own judgments. But can it be entertained when the object is to revoke the probate of a will by a decree to annul the judgment of probate? That is the precise question to be determined here.

It is contended, however, that the act of March 2, 1867, which gives the right of removal to the federal court of a suit in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, where the latter makes affidavit that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in the state court, extends the jurisdiction of the circuit court to cases of every kind of controversy which may be litigated between parties. But I cannot perceive any such intention in the act. There is no indication that the jurisdiction of the federal court was meant to be extended to any class of cases to which it did not extend before. It authorizes the removal at any time before trial, and gives the right to the plaintiff as well as the defendant. These are the only changes that seem to have been in the mind of congress.

If it is desirable that the right of removal should be extended to cases like the present, it is easy for congress to legislate to that effect. Until it does so, the right in my judgment does not exist. Perhaps it is desirable that the law should be as the plaintiff in error contends it is; but it is not for the court to make the law, but to declare what law has been made. I cannot free myself from the conviction that the decision of the court in this case is based rather upon what it is deemed the law should be than upon a sound construction of the statutes which have been actually enacted.

In my opinion the judgment of the supreme court of Louisiana ought to be affirmed.

WAITE, C. J., dissented.

COLSON v. LEWIS.

(2 Wheaton, 377-379. 1817.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This suit in equity was removed into the circuit court of Kentucky upon the petition of the defendant, filed in the state court, and, upon a motion made in the circuit court to dismiss the suit from that jurisdiction, the judges of that court were opposed in opinion and caused the follow-

ing facts to be stated, to enable this court to decide the question. Those facts are: That the value of the land in controversy exceeds \$500; that the complainants are citizens of Virginia; and that the grant under which they claim title is derived from the state of Kentucky, by virtue of warrants issued from the land office of Virginia, and locations upon the warrants before the separation of Kentucky from Virginia; that the defendant's grant is from the state of Virginia, by virtue of a warrant issued from the land office, and location made thereon before the separation of Kentucky.

§ 922. *Jurisdiction of United States courts in controversies between citizens of the same state claiming lands under grants from different states.*

The question referred to this court is, whether the circuit court for the district of Kentucky can take jurisdiction of the cause, because the grants for the land in controversy, lying in Kentucky, were issued, the one by the state of Virginia and the other by the state of Kentucky, when both grants purport to be founded upon warrants and locations made under the authority of the laws of Virginia. It is the opinion of this court that the question which is referred to us by the circuit court of Kentucky is settled by the decision of this court in the case of the town of Pawlet v. Clark, 9 Cranch, 292.

The only difference between the two cases is, that in the case referred to both parties claimed immediately under grants, the one from the state of Vermont and the other from the state of New Hampshire, before the separation, which grants were the inception of title; and that in this case both parties claim under grants, the one issued by the state of Kentucky and the other by the state of Virginia, but upon warrants issued by Virginia and locations founded thereon, prior to the separation of Kentucky from Virginia. But where the controversy arises upon claims founded upon grants from different states, as the present case is understood to be, the principle decided in the case which has been cited precisely governs this. The decision in that case is founded on the words of the constitution of the United States, which extends the judicial power of the United States to controversies between citizens of the same state, claiming lands under grants of different states. It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different states the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant.

Certificate accordingly.

GREEN v. CUSTARD.

(23 Howard, 484-487. 1859.)

ERROR to U. S. Circuit Court, Western District of Texas.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—This case originated in the district court for the county of McLennan, in the state of Texas, where Custard had instituted his suit against Green by attachment, claiming to recover from him the balance due on a judgment entered on a mortgage given by Green to one Arthur, on lands in California. Green appeared, and moved to have his cause removed to the district court of the United States, he being a citizen of Massachusetts, and Custard a citizen of Texas—the case coming clearly within the provisions of the twelfth section of the judiciary act of 1789.

It is probably because this case originated in a state court, that the court

below permitted the counsel to turn the case into a written wrangle, instead of requiring them to plead as lawyers, in a court of common law. We had occasion already to notice the consequences resulting from the introduction of this hybrid system of pleading (so-called) into the administration of justice in Texas. See *Randon v. Toby*, 11 How., 517, and *Bennett v. Butterworth*, 11 How., 669, with remarks on the same in *McFaul v. Ramsey*, 20 How., 525. This case adds another to the examples of the utter perplexity and confusion of mind introduced into the administration of justice, by practice under such codes.

Without attempting to trace the devious course of demurrers, replications, amendments, etc., etc., which disfigure this record, it may suffice to say that the plaintiff, beginning, after some time, to discover that he could not recover on his original cause of action, among other amendments set forth an entirely new cause of action, to wit, a note given by Green, payable to "Arthur or order," for \$5,000, without any indorsement or assignment by Arthur to plaintiff, but which Custard alleged he had obtained "*in due course of trade*."

After further demurrers, exceptions, etc., and after taking testimony in California, wholly irrelevant to any possible issue in the case, the record exhibits the following judgment:

"And now on this day came the parties by their attorneys, and the court being now sufficiently advised upon the question submitted, is of opinion that the judgment, the original cause of action in this case, is not conclusive—in fact, is a nullity; but because the parties plaintiff have amended their petition herein, setting forth the note, the base of said judgment, and as it has become a part of the pleadings in this case, and the court being of the opinion that, upon the note, the court is debarred from entertaining the case further in this court for want of jurisdiction, it is therefore considered by the court that the cause ought to be remanded. It is therefore ordered and decreed that this case, with all the papers belonging to the same, be and is hereby remanded to the district court of McLennan county for further action."

§ 923. *The circuit court has jurisdiction upon removal of a cause from a state court, where the parties are citizens of different states, though the case is within the restriction in section 11 of the judiciary act.*

So far as this judgment treats the original cause of action "as a nullity," it could not be objected to; and perhaps the same remark might have equally applied to the amended portion. But the conclusion that the court had no jurisdiction to proceed further, and the order to remand the case to the state court to try the other half of it, is a clear mistake, for which the judgment must be reversed. If Green had been a citizen of Texas, and Custard had claimed a right as indorsee of a citizen of Texas to bring his suit in the courts of the United States, because he (Custard) was a citizen of another state, the case would have occurred which is included in the proviso to the eleventh section of the act which restrains the jurisdiction of the court. But the United States court had jurisdiction of this case by virtue of the twelfth section. It is a right plainly conferred on Green, a citizen of Massachusetts, when sued by a citizen of Texas, in a state court of Texas, no matter what the cause of action may be, provided it demand over \$500. The exception of the eleventh section could have no possible application to the case.

Let the judgment be reversed and the case remanded for further proceedings.

§ 924. *Jurisdiction given by citizenship, absolute.*—The jurisdiction of the federal courts over suits between citizens of different states is absolute, and the circuit court will not remand such a case to the state court on account of section 915 of United States statutes providing

that the circuit court shall adopt the attachment laws of the various states. *Bates v. Days*, 11 Fed. R., 529.

§ 925. **Citizenship of the parties to the real controversy must govern.**—Where, in a suit in equity in a state court, the real controversy is between one of the defendants on one side and the plaintiff and the other defendants on the other, and the defendant whose interest is thus opposed to the others is a citizen of a different state from the others, there is a controversy between citizens of different states which may be removed to the circuit court of the United States. *Harter v. Kernochan*, 13 Otto, 566 (BONDS, §§ 1421-30).

§ 926. **Consent.**—In order to sustain the jurisdiction of federal courts by reason of the citizenship of the parties to a suit, the proper citizenship must appear on the face of the record, though it is not material that it should be stated in any particular part. Mere consent of parties to remove a case from a state court to the federal court is not enough. *People's Bank v. Calhoun*, 12 Otto, 260. See § 849.

§ 927. **Citizenship of person equitably interested.**—When the citizenship of the parties to a suit is such as to give the federal courts jurisdiction of the case, and the legal title is in the plaintiff, the citizenship of any who may have an equitable interest in the case will not affect the jurisdiction. *Adams v. White*,* 2 Pittsb. R., 25.

§ 928. **No compact between two states**, by which they agree to consider the judgments of their courts final in certain cases, can be of any effect to destroy the jurisdiction of the United States courts in cases where the parties are citizens of different states. In such cases the original jurisdiction of the circuit courts, and the appellate jurisdiction of the supreme court, will prevail. *Wilson v. Mason*, 1 Cr., 91.

§ 929. **Objection, who may make it.**—When a plaintiff alleges in a bill in equity that he is a citizen of one state, and the several defendants are citizens of another state, a plea filed by two of the defendants, to the effect that the third defendant is in reality a citizen of the same state as the plaintiff, is bad; no one can take this objection except the third defendant himself. *Harrison v. Urann*, 1 Story, 65.

§ 930. **Waiver of objection.**—Suit was brought by a citizen of Illinois in the circuit court for Ohio against a citizen of Ohio and a citizen of Indiana, and the return showed service on both parties. The citizen of Indiana appeared and joined with his co-defendant in a plea of the general issue. *Held* that he had waived his right to object to the jurisdiction. *McCloskey v. Cobb*,* 2 Bond, 16. See § 849.

§ 931. **Conveyance to give jurisdiction.**—A fictitious deed of land, made only for the purpose of giving the federal courts jurisdiction of a case, by reason of the citizenship of the parties, will not be countenanced by the court. *Hurst v. M'Neil*, 1 Wash., 83. See *b, infra*.

§ 932. When one who has an equitable title to land procures a conveyance to him of the legal title in order to prosecute an action of ejectment against one who is a citizen of a different state, the plaintiff's right to sue in equity being independent of the conveyance, that conveyance of the legal title, to enable him to proceed at law instead of in equity, is not such a fraud upon the jurisdiction of the court as will bar the suit. *Browne v. Arbuckle*, 1 Wash., 486.

§ 933. The federal courts do not encourage fictitious conveyances of real estate by which a suit affecting the land may be transferred to the federal courts by reason of the citizenship of the parties. *Smith v. Shriver*, 3 Wall. Jr., 227.

§ 934. **Omission of parties to give jurisdiction.**—If a bond be executed to A., B. and C. jointly, A. alone cannot sue on it, though B. and C. be omitted in order to give the United States court jurisdiction. *Farni v. Tesson*, 1 Black, 309. See § 848.

§ 935. **A citizen of the District of Columbia** cannot maintain an action against a citizen of a state in the circuit court of the United States. *Vasse v. Mifflin*, 4 Wash., 520; *Barney v. Mayor of Baltimore*, 1 Hughes, 120; *Wescot v. Fairfield Township*, Pet. C. C., 45. See § 854.

§ 936. **Formal or nominal parties.**—If a federal court in equity can make a decree with all the parties substantially interested before it, it will not be ousted of its jurisdiction by the fact that formal parties are residents of the same state as the plaintiffs. *Wood v. Davis*, 18 How., 468.

§ 937. The United States circuit court has no jurisdiction of a suit in equity against a person residing in the United States, but not within the district for which the court is holden. If, therefore, a suit in equity is brought without proper parties, and these parties reside out of the district of the court, the court will dispense with these parties, if they are merely formal, and perhaps when they are necessary, if the rights of the parties before the court can be equitably settled without them, but not otherwise. *Russell v. Clark*, 7 Cr., 98.

§ 938. Where, in a suit in equity in a federal court, a person who might be joined as a formal defendant is a citizen of the same state as the plaintiff, the court will not order him to be made a defendant and thus oust the jurisdiction of the court. *Joy v. Wirtz*, 1 Wash., 518.

§ 939. When the jurisdiction of a case depends upon the citizenship of parties, the court will not suffer its jurisdiction to be ousted by joinder of a nominal defendant of the same state as the plaintiff, but will proceed and decide between the real parties in interest if it can be done without prejudice to the rights of others. *Wormley v. Wormley*, 8 Wheat., 450.

§ 940. When the substitution of one person instead of another as defendant would defeat the jurisdiction of a federal court, the court may order the original defendant to be continued and the real defendant in interest to give the nominal defendant security for costs. *Thomas v. Newton*, Pet. C. C., 445.

§ 941. Under a Wisconsin statute a bond to dissolve an attachment ran to the marshal. Suit on such bond may be brought in the name of the marshal, in the circuit court of Wisconsin, by citizens of another state, as the marshal is merely a nominal party. *Huff v. Hutchinson*,* 14 How., 586.

§ 942. When the jurisdiction of a federal court depends upon the citizenship of a party, the parties to the record, though merely nominal, are the ones whose citizenship decides the jurisdiction, not the parties substantially interested in the suit. *Gill v. Stebbins*, 2 Paine, 419.

§ 943. In a suit on an executor's bond, to recover a debt due from the testator to an alien, the defendant was a citizen of Virginia. The plaintiffs were justices of the peace and citizens of Virginia, but were merely nominal parties, the suit being for the use of the alien creditor. *Held*, that the citizenship of the parties was such as to give jurisdiction to the federal courts. *Browne v. Strode*,* 5 Cr., 303.

§ 944. Unnecessary parties.—If, in a suit in equity in the federal courts, where the jurisdiction depends on the citizenship of parties, some of the defendants, who are citizens of the same state as the plaintiff, are unnecessarily joined, the court will dismiss the bill as to those defendants and take jurisdiction of the suit. *Carneal v. Banks*,* 10 Wheat., 188.

§ 945. When suit is brought against several defendants, if any of them are citizens of the same state as the plaintiff, the federal courts have no jurisdiction of the suit. If, however, this objection is not made *in limine*, and such defendants are not necessary parties to the suit, the suit may be discontinued as to them, and the jurisdiction of the federal court supported. *Lockhart v. Horn*, 1 Woods, 633.

§ 946. A., a stockholder in a railroad company, brought a bill in equity in the state court against the company and the individual directors, for an injunction to restrain them from doing certain corporate acts. A. was a citizen of New York, the company was incorporated in Illinois, the individual directors were citizens of New York. The company, by petition, removed the cause to the circuit court of the United States. The plaintiff moved in that court to remand the case to the state court, for want of jurisdiction. It was held that the suit being wholly against the company, the unnecessary joinder of individual stockholders did not oust the jurisdiction. *Hatch v. Chicago, R. I. & Pac. R. Co.*, 6 Blatch., 113.

§ 947. The joinder of unnecessary parties who, on account of their citizenship, are not liable to be sued by the complainant, does not affect the jurisdiction of the court to pronounce a decree as to those who are properly joined and properly sued. *Carneal v. Banks*,* 10 Wheat., 181.

§ 948. Parties without interest.—The owner of a pre-emption right sold and gave a bond for conveyance. The purchaser, one Hay, caused the patent to be issued to him; but the patent did not issue until after he had sold his bond. The bond was subsequently assigned to the plaintiff, a citizen of Pennsylvania, who brought this bill in the United States circuit court for Kentucky, against the defendants, residing in the latter state. He alleged that he had made a conditional sale of the land, which contract became a nullity by failure to comply with the conditions; that one of the defendants, Chiles, purchased under this contract with full knowledge that it was void, and fraudulently filed a bill praying that the heirs of Hay, the holders of the legal title, might be decreed to convey to him; that the decree was obtained and was subsequently reversed. The bill made the heirs of Hay parties, and prayed for a conveyance of the legal title from those who possessed it, and also for general relief. The defendant Chiles objected to the jurisdiction of the court because there were other heirs of Hay not made defendants who were not residents of Kentucky. Both parties claimed under the same several assignments, and the heirs of Hay had no interest in the contest. It was held that the question between the plaintiff and the defendant Chiles was within the jurisdiction of the court, notwithstanding the objection. *Boon v. Chiles*,* 8 Pet., 532.

§ 949. The fact that persons are made parties to a suit who have no interest in it does not oust the jurisdiction as to those who are properly before the court. *Ibid.*

§ 950. When the plaintiff in a suit in a federal court is obliged to make a party to his suit one who has no interest in or control over the property in question, but who is joined merely to perform some ministerial act, *e. g.*, as a trustee, to make a conveyance of a legal title, the fact that such person resides in the same state with one of the actual parties to the suit will not defeat the jurisdiction of the court. *Walden v. Skinner*, 11 Otto, 589.

§ 951. **Parties who will not be affected by the decree.**—If a court of equity can make a proper disposition of a case it will do so, although a non-resident may be interested in the property, provided that the decree of the court will not affect his interest. *Society for Propagation of Gospel v. Hartland*, 2 Paine, 540.

§ 952. “The question always is, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether, to a decree authorized by the case presented, they are indispensable parties; for, if their interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.” So held on a bill in equity in the circuit court, some of the defendants in which were from the same state as the complainants. *Horn v. Lockhart*, 17 Wall., 570.

§ 953. If a court of equity can make a decree according to justice and equity between the parties before it, that decree will not be withheld because a party out of its jurisdiction is not made a party, although he must have been united in the suit had he been within reach of the process of the court. *Breedlove v. Nicolet*, 7 Pet., 431.

§ 954. If the complainants are citizens of one state, and all the respondents who are summoned are citizens of another, the federal court has jurisdiction, although other respondents whose interests will not be affected injuriously by a decree are residents of the same state as the complainants. *Heriot v. Davis*, 2 Woodb. & M., 230; *Nesmith v. Calvert*, 1 Woodb. & M., 37.

§ 955. If a suit be brought against two defendants whose interests are distinct, and one of them is not shown to be within the jurisdiction of the court, the case may proceed against the other. *Morrison v. Bennet*,* 1 McL., 330.

§ 956. When in a cause in equity in a federal court, the jurisdiction depends upon the citizenship of the parties, and one of the defendants is a citizen of the same state as one of the plaintiffs, if the court can make a full and equitable decree respecting the rights of the other defendants, without him, they will strike him from the number of defendants in order to sustain jurisdiction of the case. *Vattier v. Hinde*, 7 Pet., 261.

§ 957. When one of two parties jointly bound is properly before the circuit court as defendant, and the other is a resident of another state and beyond the reach of process, and would not be prejudiced by a judgment against the former, the court has jurisdiction under the act of 1839. *Doremas v. Bennet*,* 4 McL., 224.

§ 958. **Residents of the district, really plaintiffs, made defendants.**—When some parties who should be made co-plaintiffs in an equity cause in a federal court are citizens of the same state as the defendants, they may refuse to join as plaintiffs and be made defendants. *Wisner v. Barnett*, 4 Wash., 642.

§ 959. **Joinder of defendants where it would defeat the jurisdiction.**—Where the holder of a bond given by a corporation and secured by a mortgage brings suit in a federal court to foreclose the mortgage, he is not obliged to join as respondents other holders of similar securities, if resident in other states, even if they refuse to unite as complainants, as the effect would be to oust the jurisdiction of the court. *Hotel Co. v. Wade*, 7 Otto, 20 (CONV., §§ 1440-46).

§ 960. On a bill filed by aliens against citizens of the state of New York, two persons filed a petition to be made parties. *Held*, that they could not be made defendants, as it would oust the jurisdiction of the court, the petitioners not having stated in their petition that they were citizens of New York. *Drake v. Goodridge*, 6 Blatch., 151.

§ 961. **Necessary party residing without the district.**—When a person resident without the district of a federal circuit court is a necessary party to a cause in equity, not because process must be served on him to carry out the decree of the court, but because he has an interest in the subject-matter of the suit, the court will retain the cause till he is made a party. *Winter v. Ludlow*,* 3 Phil., 464. See § 844.

§ 962. A circuit court cannot entertain a suit where a necessary party cannot be subjected to its jurisdiction. *Dormitzer v. Illinois, etc., Bridge Co.*,* 6 Fed. R., 217.

§ 963. **Absence of indispensable party.**—The act of February 28, 1839, does not give jurisdiction to the court in the absence of an indispensable party. *Barney v. Baltimore*, 6 Wall., 280 (§§ 1221-25).

§ 964. **All must be competent to sue.**—When jurisdiction depends upon the character of the parties, and several join in a suit, all must be competent to sue. Hence, the court has no jurisdiction in a suit by a non-resident against a county, to enjoin the collection of a tax, when complainant claims to sue not only for himself but for all others owning taxable property in the county, even if such owners could be regarded as parties to the suit without appearing on the record as such, elsewhere than in the allegation mentioned. *Adams v. Douglas County*,* McCahon, 235. See § 843.

§ 965. Defendant must reside in state where suit is brought.—The circuit court of the United States in Massachusetts cannot entertain a suit by a citizen of Vermont against citizens of New Hampshire, although citizens of Massachusetts are co-defendants. *Tuckerman v. Bigelow*,* 21 Law Rep., 208.

§ 966. The circuit court for New York had (in 1867) no jurisdiction of a case in which the plaintiff alleged himself to be a citizen of Georgia and the defendant to be a citizen of Massachusetts. *Kelly v. Harding*,* 5 Blatch., 502.

§ 967. Under the judiciary act of 1789, the circuit court had no jurisdiction by reason of citizenship, unless one of the parties was a citizen of the state where the suit was brought. *White v. Fenner*,* 1 Mason, 520; *Shute v. Davis*,* Pet. C. C., 431; *Kitchen v. Williamson*,* 4 Wash., 84; *Moffat v. Soley*,* 2 Paine, 103.

§ 968. Where the plaintiff and one of several defendants were alleged in the bill to be citizens of the same state, *held*, that the court had no jurisdiction of the suit. *Van Antwerp v. Hulburd*, 8 Blatch., 282 (BANKS, NAT., §§ 40-43).

§ 969. Suit by citizen of one state against corporation residing in another.—The circuit courts of the United States have jurisdiction in all cases in which the allegations of the record show that a citizen of one state sues a corporation chartered in another. *Marshall v. Baltimore, etc., R. Co.*, 16 How., 326 (CONTRACTS, §§ 555-62).

§ 970. Subsequent change of domicile.—Where the parties to a suit in the circuit court of the United States are citizens of different states at the commencement of the suit, a subsequent change of domicile and citizenship will not oust the jurisdiction. *Clarke v. Matthewson*,* 2 Sumn., 262.

§ 971. When jurisdiction depending upon the citizenship of the parties has once attached, in a federal court, no subsequent change in the residence of the parties will divest the jurisdiction of the court. *Morgan v. Morgan*, 2 Wheat., 297.

§ 972. When a suit is brought in the circuit court by a citizen of one state against a citizen of another, and after the suit is instituted the plaintiff becomes a citizen of the same state as the defendant, and dies, and her administrator, also a citizen of that state, is made plaintiff in her stead, the objection that both parties are then residents of the same state will not oust the jurisdiction of the court, for when it has once attached a change of residence of the parties will not divest it. *Trigg v. Conway*, Hemp., 712.

§ 973. Suit by administrator.—One who takes out letters of administration in the state in which he lives, upon the estate of one who lived in the same state, may sue inhabitants of another state in the federal courts, although after the suit is begun he takes out letters of administration in that other state. *Carter v. Treadwell*, 3 Story, 50. See § 850.

§ 974. When the allegations of a bill brought by an administrator and a residuary legatee of a deceased against an executor of another deceased show that the complainants are aliens, and the defendant a citizen of one of the United States, the federal courts have jurisdiction of the case, although it is proved that both the deceased persons were citizens of the same state. *Chappedelaine v. Dechenaux*, 4 Cr., 307 (ACCOUNTS, § 21).

§ 975. When plaintiff dies, in an action in the circuit court of the United States, and his administrator takes up the case, the fact that the administrator is a citizen of the same state as the defendant does not oust the jurisdiction of the court. *Hatfield v. Bushnell*,* 22 Vt., 660.

§ 976. The circuit court has no jurisdiction of a suit brought by an administrator against a citizen of the same state, although the intestate was a citizen of another state and could have maintained the suit. *Dodge v. Perkins*,* 4 Mason, 435.

§ 977. Suit between executors.—Where the plaintiffs and defendants are executors, and are described as citizens of different states, the federal courts will take jurisdiction of the cause, although it is not alleged that the deceased persons were citizens of different states. *Childress v. Emory*, 8 Wheat., 668. See § 850.

§ 978. Suit by receiver.—When the record shows that the plaintiff is a citizen of one state, and the defendants citizens of another, suit may be maintained in the federal courts, although the plaintiff sues in his official capacity as the receiver of a railroad company incorporated by the laws of, and domiciled in, the state of which the defendants are citizens. *Gray v. Davis*, 1 Woods, 427.

§ 979. When a receiver of a railroad is sued in a state court, and removes the suit to the circuit court, on the ground that he is a citizen of New Jersey, appointed receiver by a New Jersey court, and the plaintiff is a citizen of New York, the fact that the receiver has an ancillary appointment in New York is not cause for remanding the suit. *Davies v. Lathrop*, 12 Fed. R., 353.

§ 980. Infant suing by next friend.—When suit is brought by an infant, by her next friend, if the infant is a citizen of a different state from the defendant, the fact that the next

friend is a citizen of the same state as the defendant does not oust the jurisdiction of the United States circuit court. *Williams v. Ritchey*, 3 Dill., 406.

§ 981. **Suit by assignees in bankruptcy.**—The circuit court of the United States has jurisdiction, by reason of the citizenship of the parties, if suit is brought by the assignees in bankruptcy of a railroad corporation chartered in one state against the directors of the company who are all citizens of another state, the assignees being citizens of the state in which the corporation was chartered. *Gindrat v. Dane*, 4 Cliff., 263. See DEBTOR AND CREDITOR.

§ 982. When two partners go into bankruptcy successively, and an assignee is appointed for each, and one assignee brings suit against the other in the circuit court of the United States to reach partnership assets, if the assignees are citizens of the same state, the circuit court has no jurisdiction of the case. Section 2 of the bankrupt act does not give jurisdiction. *Stevens v. Appleton*, 4 Cliff., 271.

§ 983. **A suit by a stockholder** of a bank, incorporated in another state, against the bank and others to restrain the collection of a tax illegally imposed on the bank by a state law, is within the equity jurisdiction of the circuit court of the United States. *Dodge v. Woolsey*, 18 How., 333 (CORP., §§ 565-73).

§ 984. A stockholder of a corporation, resident in a state other than that in which the corporation is chartered, may sue it in the federal courts. *Ibid.*

§ 985. A., a citizen of Massachusetts, owned stock in a railroad company which was consolidated from three single corporations in Maryland, Delaware and Pennsylvania. An illegal tax was imposed upon the road by the legislature of Delaware. A. demanded of the directors of the road that they should resist the payment of the tax. They refused. It was held that on these facts A. was entitled to bring a bill in equity in the United States circuit court for the district of Delaware to restrain the collection of the tax. *Minot v. Philadelphia, Wilm. & Balt. R. Co.*, 2 Abb., 329.

§ 986. A stockholder of an incorporated company has no right to bring a bill in equity to restrain another from doing an act which will injure the company, unless the officers of the company refuse to bring such a suit. The fact that such stockholder is a citizen of a different state from the defendant does not create a right of action, but gives the federal courts jurisdiction of already existing actions. *Morgan v. Railroad Co.*, 1 Woods, 16.

§ 987. When, in a cause in equity, the jurisdiction of the United States circuit court depended on the fact that the plaintiff was an alien, and the suit was for dividends on stocks, it was held that, the case showing at hearing that the plaintiff was not entitled to relief, the court thus lost jurisdiction of the case, and would not proceed to decree a transfer of the stock, to settle rights among the defendants as an ordinary court of equity would do. *Lowry v. Commercial & Farmers' Bank*, Taney, 337.

§ 988. **Citizen of no state.**—To deprive an American citizen of the right to sue in a federal court, on the ground of his not being a citizen of any particular state, there ought to be very strong evidence of his being a mere wanderer without a home. *Rabaud v. D'Wolf*, 1 Paine, 588. See §§ 839, 840.

§ 989. **A negro**, the child of slave parents, although emancipated or born free, is not a citizen of the United States so as to be able to sue a citizen of another state in the federal court. (Curtis, J., dissenting, held that as free colored persons born within some states are citizens of those states, such persons are also citizens of the United States, and may, in proper cases, sue in the federal courts.) *Scott v. Sandford*, 19 How., 588.

§ 990. **The Union Pacific Railroad Co.**, a corporation existing under the laws of the United States, may, under its charter allowing it to sue and be sued in all courts within the United States, sue and be sued in the federal courts without reference to citizenship. *Bauman v. U. P. R. Co.*,* 3 Dill., 367; *Smith v. U. P. R. Co.*,* 2 Dill., 278.

§ 991. **Jurisdiction given by subject-matter.**—When jurisdiction is given to a federal court by the subject-matter, *e. g.*, if the suit is for the infringement of a patent, any issue as to the citizenship of the plaintiff raised by the pleadings is immaterial. *Fischer v. Neil*, 6 Fed. R., 91.

§ 992. **Federal question.**—Where a case involves the decision of a federal question, the circuit court has jurisdiction without reference to the citizenship of the parties. *Crescent City, etc., Co. v. Butchers', etc., Co.*,* 12 Fed. R., 225.

§ 993. **Suit against indorsers.**—Under the act of February 28, 1839, a suit may be prosecuted by non-residents against citizens of the state where suit is brought as indorsers on a note, although they were indorsers jointly with others who are beyond the jurisdiction of the court. *Cooper v. Gordon*,* 4 McL., 6.

§ 994. **Note payable to bearer.**—A holder of a note payable to bearer may, if he is a citizen of a different state from the maker, sue him in a federal court without regard to the ability of the former holders to sue in such courts. *Bank of Kentucky v. Wister*, 2 Pet., 326 (BANKS, §§ 265-69).

§§ 995-1008. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 995. A bill of exchange drawn by a citizen of one state upon a citizen of another state is a foreign bill of exchange within the meaning of the exception to the eleventh section of the judiciary act of 1789, relating to suits to recover the contents of promissory notes and other choses in action. *Buckner v. Finley*, 2 Pet., 586 (BILLS AND NOTES, § 941).

§ 996. Internal revenue laws.—Where both parties reside in the same state the circuit courts have no original cognizance of any case arising under the internal revenue laws. The jurisdiction given in such cases by the acts of March 2, 1833, and June 30, 1864, was taken away by the act of July 13, 1866. *Hornthall v. The Collector*,* 9 Wall., 560.

§ 997. Suits against warehousemen.—A federal court has generally no jurisdiction of suits against warehousemen by citizens of the same state. *The Mary Washington*, Chase's Dec., 128.

§ 998. Suit by state.—The circuit court has no jurisdiction of a suit by a state against citizens of the same or another state. *Gale v. Babcock*, 4 Wash., 200. See § 838.

§ 999. Suit by county.—An organized county of a state, having the right to sue and be sued by the laws of that state, may maintain a suit in any of the federal courts. *Marion County v. McIntyre*,* 2 McC., 143.

§ 1000. Auxiliary suit.—When a suit is properly instituted in the circuit court of the United States between citizens of different states, and that court has jurisdiction of the subject-matter, but it becomes necessary to institute another suit as auxiliary to the first, in order to administer perfect justice between the parties, the circuit court will take jurisdiction of the auxiliary suit although one of the defendants may be a citizen of the same state as the plaintiff. *Stone v. Bishop*, 4 Cliff., 597.

§ 1001. Cross-bill.—A citizen of Ohio filed a bill in equity to quiet the title to certain real estate, in the United States circuit court, against two citizens of Arkansas. One of the defendants filed a cross-bill making the other defendant and the original plaintiff co-defendants. It was held that the cross-bill being necessary to the defense of the defendant, and being against parties already before the court, the court had jurisdiction of it as ancillary to the original bill, and without regard to the citizenship of the parties. *Schenck v. Peay*, 1 Woolw., 182.

§ 1002. Bill to impeach a decree of same court.—When a bill in equity is brought in the circuit court to impeach a decree of that court as fraudulent and void, the circuit court has jurisdiction of the bill although complainant and defendants are citizens of the same state. The jurisdiction in such a case is an incidental outgrowth of the original suit in which the fraudulent decree was rendered, and arises from the fact that no other court, state or federal, could entertain a bill to declare the decree fraudulent and void. *Osborn v. Michigan Air Line R. Co.*, 2 Flip., 504.

§ 1003. Scire facias to revive a judgment.—When a *scire facias* is issued to revive a judgment, if the citizenship of the original parties in the suit was such as to give the federal court jurisdiction, the fact that the real parties in interest in the *scire facias* are citizens of the same state does not oust the jurisdiction of the court. *Penn v. Klyne*, Pet. C. C., 449.

§ 1004. Decree against agents where principals are non-resident.—Where the subject-matter of a bill in equity is within the jurisdiction of a circuit court of the United States, but is owned by parties residing out of such jurisdiction, but managed by their agents, the court will proceed to make decree against the agents. *United States v. Parrott*, McAl., 277.

§ 1005. Policy in name of agent, suit by principal.—In an action on a policy of insurance taken in the name of an agent, the suit may be brought in the name of the owner of the goods, and if he is a citizen of a different state from the defendant, the United States courts have jurisdiction. *Ruan v. Gardner*, 1 Wash., 147.

§ 1006. Habeas corpus by father to recover custody of child from mother.—This court has no authority to issue a writ of *habeas corpus* to enable a father to recover the custody of his infant daughter, who had been abducted by the mother from the persons in whose charge the father had left her, either under section 14 of the judiciary act, giving authority to the United States courts to issue writs of *habeas corpus*, or under section 11 of the act of 1789, giving the circuit court original concurrent jurisdiction with state courts, when the plaintiff is a citizen of another state and the amount in controversy exceeds \$500. *Ex parte Everts*, 1 Bond, 197.

§ 1007. Citizenship of owner and tenant in ejectment.—When, in an ejectment suit, the owner of the land is admitted as co-defendant with the tenant in possession, he is not thereby made the sole defendant, and although he is a citizen of a different state from the plaintiff, the cause cannot be taken to a federal court if the other defendant is a citizen of the same state as the plaintiff. *Beardsley v. Torrey*, 4 Wash., 287.

§ 1008. Foreign attachment.—When a suit of foreign attachment was brought in the circuit court for the district of Pennsylvania against one who was a citizen of Delaware, and who was not found in Pennsylvania when the writ was served, it was held that the court had no jurisdiction of the suit. *Hollingsworth v. Adams*, 2 Dal., 396.

§ 1009. A process of garnishment, as constituted by the laws of Arkansas, is not a mode of enforcing a judgment on an execution, but is a civil suit. Where, therefore, a suit is brought by a citizen of Arkansas against a citizen of another state in the circuit court, and, judgment having been obtained, the plaintiff summons a citizen of Arkansas as garnishee in the circuit court, that court will not take jurisdiction of the garnishment process. *Tunstall v. Worthington*, Hemp., 662.

§ 1010. Trespass.—An action may be brought for a trespass committed outside the limits of the United States, in the circuit court for any district in which the defendant may be found, upon process against him, if the citizenship of the parties is such as to give jurisdiction, *i. e.*, if they are residents of different states. *Mitchell v. Harmony*, 13 How., 137.

§ 1011. Citizenship after divorce.—If, after a divorce, the woman remains in the state where the parties had previously lived, and the man removes to a different state, they become citizens of different states, so as to sue in a federal court. *Bennett v. Bennett*, Deady, 306. See §§ 856, 857.

§ 1012. Corporation suing in state where it is disqualified to do business.—An insurance corporation, organized in one state, but which has not complied with the statutes of another state in reference to the transaction of business therein, may still sue in the federal court in such latter state. *Northwestern Mut. Life Ins. Co. v. Elliott*, 7 Saw., 24.

§ 1013. Suits to recover back taxes illegally assessed and collected by the United States can be begun in the federal courts only when the parties are citizens of different states. If they are citizens of the same state, the suit should be brought in the state courts and removed to the federal courts by petition, or, after judgment, by writ of error. *The Collector v. Hubbard*, 12 Wall., 8.

§ 1014. Creditor's bill.—When a creditor brings a bill in equity against his debtor to recover property fraudulently conveyed by the debtor, and the assignee in bankruptcy refuses to allow the suit to be brought in his name, if the creditor is a citizen of the same state as the debtor, the circuit court has no jurisdiction of the case, either by reason of the citizenship of parties, or by the provisions of the bankrupt act. *Glenny v. Langdon*, 8 Otto, 22.

§ 1015. Suits on a marshal's bond are now brought in the name of the party injured instead of that of the United States. The federal courts still have jurisdiction of the case, however, though all the parties may be citizens of the same state. *Adler v. Newcomb*, 16 Int. Rev. Rec., 142, 174; 2 Dill., 45. See § 855.

§ 1016. Foreclosure suit by bondholder.—When a holder of a bond secured by a mortgage or trust deed given by a corporation sues the corporation to foreclose the mortgage, he may join as respondents other bondholders who refuse to be joined as plaintiffs; and if the plaintiff is a resident of one state and the corporation was incorporated in another, and the bondholders so joined as defendants are citizens of the latter state, the circuit court has jurisdiction. *Hotel Co. v. Wade*, 7 Otto, 19 (CONV., §§ 1440-46).

§ 1017. Right given by state laws.—When a general right is given by a state statute, such as a right to recover damages from a railroad company for a death caused by the negligence of the railroad employees, this right may, if the citizenship of the parties gives the federal courts jurisdiction, be enforced in those courts, although the statute giving the right says the suit shall be brought in a court established by the state laws. *Railway Co. v. Whitton*, 13 Wall., 285 (§§ 585-88).

§ 1018. Abandoned or captured property.—The circuit courts of the United States have no jurisdiction of matters arising under the abandoned or captured property act, where both parties are citizens of the same state. *Mail Company v. Flanders*,* 12 Wall., 130.

§ 1019. Bankruptcy.—The national bankrupt law does not deprive state courts of jurisdiction over suits brought to decide rights of property between the bankrupt or his assignee and third persons. Whenever, in such a suit, the plaintiff is a citizen of one state, and the defendants of others, the circuit court of the United States may take jurisdiction, and its decree is valid and not affected by the intervening bankruptcy; neither is the assignee a necessary party, but he is bound by the decree, whether a party or not, just as any purchaser of property *pendente lite*. *Burbank v. Bigelow*, 2 Otto, 182. See DEBTOR AND CREDITOR.

§ 1020. Ejectment for lands in Connecticut. Part of the plaintiffs being described as citizens of Vermont, and part as citizens of Connecticut, and the defendant as a citizen of New York, but dwelling in Connecticut (in possession of the demanded premises), it was held that the court had no jurisdiction. *Bissell v. Horton*,* 3 Day (Conn.), 281.

§ 1021. Removal from state to federal court.—In order to remove a cause into the federal court from a state court, all the parties plaintiff must be citizens of the state in which the suit is brought, and all the parties defendant citizens of some other state or states. Hence, when a citizen of Vermont and a citizen of New Hampshire sued a citizen of New York, in the Vermont state court, it was held that the suit could not be removed into the circuit court for the district of Vermont. *Hubbard v. Northern R. Co.*, 3 Blatch., 84. See §§ 860-64.

§§ 1022-1032. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1022. If a suit is begun in a state court by a citizen of that state and a citizen of another state, as administrators of a citizen of the former state, against a company incorporated in a third state, the case cannot be removed to the United States circuit court. *Belknap v. Northern R. Co.*, * 25 Vt., 718.

§ 1023. When a corporation, organized under a state charter, is empowered, by its charter, to take land, and a method is prescribed of ascertaining the damages therefor, in a court of the state, if the owner of land so taken is a citizen of another state, and the corporation proceed in the state court for assessment of damages, the owner may remove the case to a federal court, as this is a controversy between citizens of different states. *Boom Co. v. Patterson*, 8 Otto, 406.

§ 1024. When a suit is brought in a state court by two plaintiffs, one a citizen of the state where the suit is brought, and the other a citizen of another state, against a citizen of a third state, the suit does not fall within the provision of the twelfth section of the judiciary act of the United States, allowing removal to a federal court. *Hubbard v. Northern R. Co.*, 3 Blatch., 86.

§ 1025. When a colored citizen is sued in the state court by a citizen of his own state, he cannot remove the cause into the federal court, because he fears and believes that by reason of the local prejudices on account of his color and race he will not be able to enforce his rights. This right is only given when he is sued by a citizen of another state. *Fowlkes v. Fowlkes*, * 8 Ch. Leg. N., 41.

§ 1026. When several defendants are sued in a state court, and one is a citizen of the same state as the plaintiff, the others not being citizens of that state, if such defendant is a merely nominal party, the suit may be removed by the others to the federal court, but if such defendant is a necessary party, the suit cannot be so removed. *Ward v. Arredondo*, 1 Paine, 411.

§ 1027. Where a township and a tax payer thereof filed a bill in equity in the state court to have the bonds of the township canceled, and the state treasurer, and auditor, the county clerk and treasurer, the township collector, supervisor and clerk and other officials, and the unknown holders or owners of the bonds enjoined forever from bringing suit, and one bondholder, a citizen of another state, appeared and petitioned to remove the suit to the circuit court of the United States, it was held that as the controversy was substantially between him and the township, the circuit court had jurisdiction. *Harter v. Kernochan*, 13 Otto, 566 (BONDS, §§ 1421-30).

§ 1028. When a case is begun in a state court, and the defendant files a petition for its removal to a federal court, alleging that he is a citizen of New Jersey, and the plaintiffs, as executors, are citizens of New York, the state court may retain the case, for the petition does not on its face state a case for removal. Where the jurisdiction of the federal courts depends on citizenship of parties, it refers to the parties as persons, not as officers. *Amory v. Amory*, 5 Otto, 187.

§ 1029. An action for the negligent killing of the plaintiff's intestate was brought by the personal representative, a citizen of New York, in the New York supreme court, against the receiver of a New Jersey railroad. The receiver was a citizen of New Jersey and was appointed by the New Jersey court, but had an ancillary appointment by the New York supreme court as to all property in New York, and the suit was begun by leave of that court. The defendant filed an answer and then removed the case to the circuit court, where it was tried and an order made dismissing it. The plaintiff then moved to remand the case to the supreme court of New York. It was held that the suit was properly removed to the circuit court, as the receiver was personally a citizen of New Jersey, and this is what governs, although he is described in the complaint as a receiver of a railroad doing business under the laws of the state of New York and having its principal office, now the office of the receiver, in the city of New York, and that he became receiver by appointment of court, and the suit is brought under a statute of the state of New York allowing damages for such killing. *Davies v. Lathrop*, 12 Fed. R., 353.

§ 1030. — under act of 1875.— Under the act of congress of March 3, 1875, the right of removing a cause from a state court to the federal circuit court exists wherever there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state. *Girardey v. Moore*, 3 Woods, 402.

§ 1031. Under the act of congress of March 3, 1875, it is necessary, in order to remove a case from a state court on the ground of citizenship, that each individual plaintiff shall be a citizen of a different state from each individual defendant. *Petterson v. Chapman*, 13 Blatch., 397.

§ 1032. Where the plaintiff and one of two defendants are citizens of the same state, and the controversy between the plaintiff and either defendant is such that it is not separable

from that of the other, the case cannot be removed from the state court to the federal court either under the statute of 1866 (R. S., § 639, subsec. 2), or statute of 1875 (18 St., 470). *Chester v. Chester*, 7 Fed. R., 5.

§ 1033. — **under act of 1867.**—The act of congress of March 2, 1867, authorizes the removal of a suit from a state to a federal court when there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state. Under this statute, if suit is brought in a state court by a citizen of another state against a corporation which he alleges is “a corporation created by an act of the legislature of” a third state, “located in” a city in the state where suit is brought, “by its agent,” X, “and doing business in that city under and by virtue of the laws of that state,” as the averments show that neither party is a citizen of the state where suit is brought, the cause cannot be removed. *Insurance Co. v. Francis*, 11 Wall., 215.

§ 1034. When suit is brought against three defendants in a state court of the state in which the plaintiff resides, and one of the defendants is a citizen of that state, the case cannot be removed to a federal court by petition of the other defendants under the act of March 2, 1867. *Case of Sewing Machine Companies*, 18 Wall., 577.

§ 1035. Under the act of congress of March 2, 1867 (14 Stat. at Large, 558), if a citizen of one state sues a citizen of another state in the court of the latter state, and joins as another defendant the citizen of a third state, who voluntarily appears, the plaintiff is entitled to have the cause removed to the federal court. *Sands v. Smith*, 1 Dill., 291.

§ 1036. The fact that garnishees in a suit are citizens of the same state as plaintiff does not hinder the removal of the suit to a federal court under the act of congress of March 2, 1867. *Cook v. Whitney*, 3 Woods, 718.

§ 1037. In order to authorize the removal of a case from a state court to a federal court, under the act of March 2, 1867, it is not necessary that the parties to the suit should be citizens of different states at any time before the petition for removal is filed. *Ibid.* As to removal of causes, see PRACTICE.

(2) What is a Citizen Within the Judiciary Acts.

[See CITIZENS AND ALIENS.]

SUMMARY—*Meaning of citizenship*, § 1038.—*Intention, how shown*, § 1039.—*Citizenship dependent on domicile*, § 1040.—*Change of domicile*, § 1041.—*Change must be bona fide*, § 1042.—*Evidence of intention requisite*, § 1043.

§ 1038. Citizenship, in relation to the federal judiciary, means that kind of citizenship which identifies the party with some particular state. *Butler v. Farnsworth*, §§ 1044-45.

§ 1039. Intention in a question as to change of citizenship is to be gathered rather from acts than from declarations. *Ibid.* See § 1050.

§ 1040. A citizen of the United States is a citizen of that state where his domicile is placed; and domicile depends upon a variety of circumstances, including birth, residence, residence of family, acquisition of property, etc. *Prentiss v. Barton*, § 1046.

§ 1041. A citizen of one state may acquire citizenship in another and gain the right to sue in the federal court as a citizen of that state, provided that he acts in good faith, although leaving his family in the former state, and subsequently, during pendency of the suit, returning there to live. *Blair v. Western Seminary*, § 1047. See § 1057.

§ 1042. One may change his citizenship for the purpose of suing in the federal court, but the change must be *bona fide* and with the intention of remaining, and not merely ostensible. *Case v. Clarke*, § 1048.

§ 1043. A change of residence with no evidence of an intention to make it permanent, held insufficient to show a change of citizenship. *Catlin v. Gladding*, § 1049. See § 1050.

[NOTES.— See §§ 1050-1064.]

BUTLER v. FARNSWORTH.

(Circuit Court for Pennsylvania: 4 Washington, 101-104. 1821.)

STATEMENT OF FACTS.—Plaintiff's lessor, during and after the war of the Revolution, resided in South Carolina, and so continued to reside up to the year 1791, when he and his family removed to Philadelphia. He claimed, however, a citizenship in South Carolina, where he held a large property, and represented that state in congress up to 1804. He always claimed his citizenship of

South Carolina, and refused to pay the personal tax regularly assessed upon him in Pennsylvania.

§ 1044. *Citizenship in relation to the federal judiciary must be of that kind which identifies the party with some particular state.*

Opinion by WASHINGTON, J.

The case of *Cooper v. Galbreath* was very ably argued by the counsel upon the point of federal jurisdiction, and was maturely considered by the court. The opinion then given remains unshaken by the argument which we have now heard in opposition to it. With respect to the immunities which the rights of citizenship can confer, the citizen of one state is to be considered as a citizen of each and every other state in the Union.

But the privilege of suing in the tribunals of the nation cannot possibly depend upon the fact of *general* citizenship, because if it did the jurisdiction of those tribunals would extend to every case where citizens were parties, since a citizen of Pennsylvania, suing a citizen of the same state, might truly allege that he is himself a citizen of any other state, and that the defendant is a citizen of the state in which the suit is brought. Or, every case in which citizens are parties might, by the same course of argument, be excluded; since it being equally true that a citizen of New Jersey, who is plaintiff, is also a citizen of Pennsylvania, the Pennsylvania defendant might plead that the plaintiff and defendant are citizens of the same state.

It is plain, therefore, that citizenship, in relation to the federal judiciary, cannot be that which has just been referred to, but must be of that kind which identifies the party with some particular state of which he is a member. The theory of this provision in the constitution is the danger of partiality in the state tribunals, where the suit is between a member of the political family where the suit is instituted, and a stranger. Citizens, in reference to federal jurisdiction, are mentioned as in opposition to each other. It is a citizen of *one state*, and a citizen of *another state* in which the suit is brought, which can never be explained by a *general* citizenship, which confounds all distinction and admits of no opposition. The only rational construction of the constitution, in relation to federal jurisdiction, is to limit it to cases where the suit is between the *resident citizens* of different states, or where an alien is a party.

No difficulty has ever existed or could exist where the suit is between the native or factitious citizens of one state and those of another. But when a removal takes place from one state to another, the question necessarily arises whether the person so removing is a citizen of the state in which he was born, or was naturalized, or of that to which he had removed. As to this matter we can add nothing to what was said in the case of *Cooper v. Galbreath*. The question of law arising upon the particular facts of each case must always be, Has the person so removing become incorporated into the new society, so as to be a member of it, in like manner as he was of the political family from which he emigrated? In other words, has he changed his domicile, and become a permanent resident in the state to which he has removed? Mere residence is *prima facie* evidence of such a change; although, when it is explained and shown to have been for mere temporary purposes, the presumption is repelled.

§ 1045. *Intention as to a change in citizenship must be gathered from the acts of the party, if these are in contrast with his declarations.*

It is true that the intention of the party in changing the place of his residence is a material ingredient in the question of citizenship as it concerns federal jurisdiction. But this intention is to be collected from the *acts* and not

from the *declarations* of the party. If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicile, however frequent and public his declarations to the contrary may have been. If, on the other hand, the sincerity of the removal, for the purpose of permanently residing in the state which the person has selected, be not questioned, and his acts correspond with such purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicile; although he may have uniformly declared, as it is contended the lessor of the plaintiff has done, that he nevertheless considered himself as continuing a citizen of South Carolina. It is a conclusion of law upon certain facts which constitutes him a citizen of the state where he permanently resides, which neither his private intentions nor his public declarations can alter. Were it otherwise, a door would be opened for the grossest frauds upon the jurisdiction of the federal courts; since a person in the predicament stated might qualify himself to sue, or disqualify himself from being sued, in those courts, by declarations known perhaps only to a few of his friends, though in manifest hostility to open and notorious acts from which alone the world can judge of his intentions.

As to the cases cited from Cranch, they only prove that the declaration must set forth the jurisdiction of the court, by stating that the parties *are citizens* of different states. But if this allegation be traversed, the question will still remain to be decided, what constitutes such a citizenship? The declaration, however, need not go farther than to make the general allegation. But it is not sufficient to state that the plaintiff or defendant is *of*, or *resident*, or *carrying on trade* within, a particular state; because he may truly be what is asserted, and yet not be a permanent resident or domiciled citizen of that state. As to the lessor of the plaintiff, if this state be not the place of his domicile, it is impossible that *acts* can, in any instance, amount to a change of domicile, or of permanent residency. We are clear that the law is against him, and we therefore direct the rule to be made absolute.

PRENTISS v. BARTON.

(Circuit Court for Virginia: 1 Marshall, 389-393. 1819.)

STATEMENT OF FACTS.—Prentiss alleged himself to be a citizen of Maryland. The defendants contended that he was a citizen either of the District of Columbia or of Virginia, and called for strict proof of his citizenship.

§ 1046. *What constitutes citizenship with reference to the jurisdiction of the circuit court.*

Opinion by MARSHALL, C. J.

The jurisdiction of the court in this case depends on the citizenship of the plaintiff. If he was a citizen of the District of Columbia or of the commonwealth of Virginia, this suit cannot be maintained; if he was a citizen of any other state he may sue in this court. Before I proceed to examine the facts in this case I will consider the principle which must govern it.

The constitution of the United States gives the courts of the Union jurisdiction over controversies arising “between citizens of different states” [art. III, sec. II, 1], and the judicial act gives this court jurisdiction “where the suit is between a citizen of the state where the suit is brought and a citizen of another

state.” The constitution, as well as the law, clearly contemplates a distinction between citizens of different states; and, although the fourth article declares that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,” yet they cannot be, in the sense of the judicial article, or of the judicial act, citizens of the several states. There is still a distinction between them, if in no other respect, in their right to sue in the courts of the Union. This distinction, although it may be clear enough in theory, cannot always be easily drawn in fact. In a government composed like ours of distinct governments, and containing the principle which has been stated, it cannot depend entirely on birth. A citizen living in a state, with all the privileges and immunities of a citizen of that state, ought to share its burthens also, and will be considered, to every purpose, as a citizen. Accordingly, the universal understanding and practice of America is, that a citizen of the United States, residing permanently in any state, is a citizen of that state. Otherwise a citizen by statute could never belong to any state, and could never maintain a suit in the courts of the United States. In the sense of the constitution and of the judicial act, he who is incorporated into the body of the state, by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state in which his domicile is placed. What is permanent residence? This question must, in some cases, depend on a great variety of considerations; and, as in all mixed and doubtful questions of fact, each circumstance must be allowed its due weight. Birth alone, undoubtedly, gives a man permanent rights as a citizen; and although those rights, so far as respects suits in the courts of the United States, may be changed by a change of residence, yet, in doubtful cases, birth will always have great influence.

This question has never come directly, so far as I can discover, before the supreme court of the United States. The cases rather prove that the jurisdiction of the court must be shown, than determine what constitutes citizenship. The first is that of *Bingham v. Cabot*, 3 Dal., 382, which was decided in 1798. The declaration was in the name of John Cabot, of Beverly, in the district of Massachusetts, merchant, and in the name of other plaintiffs, described in the same manner. The court were clearly of opinion that it was necessary to set forth the citizenship or alienage of the respective parties in order to bring the case within the jurisdiction of the circuit court.

In the argument the attorney-general observed: “A citizen of one state may reside for a term of years in another state of which he is not a citizen, for citizenship is clearly not co-extensive with inhabitancy.” Mr. Dexter, in support of the jurisdiction, contended that citizenship in a particular state may be changed without going through the forms and solemnities required in case of an alien; that, on the principles of the constitution, a citizen of the United States is to be considered more particularly as a citizen of that state in which he has his family, is a permanent inhabitant, and is, in short, domiciliated.

This question came on again, in 1803, in the case of *Abercrombie v. Dupuis*, 1 Cranch, 343. The suit was brought in the district of Georgia, and the plaintiffs averred “that they do severally reside without the limits of the district of Georgia aforesaid, viz., in the state of Kentucky; therefore, they have a right to commence their said action,” etc. The judgment was reversed on the authority of the case of *Bingham v. Cabot et al.* The question came on again, in 1804, in the case of *Wood v. Wagnon*, 2 Cranch, 9, also from the district of Georgia.

The declaration in that case stated the plaintiff to be a citizen of Pennsylvania, and the defendant to be "of Georgia." The judgment in this case was also reversed.

These cases all show that the jurisdiction of the court must appear on the record; but the last shows that jurisdiction is not given by averring a party to be of a particular state. The plaintiff was a citizen of Pennsylvania, and had, consequently, a right to sue either an alien or a citizen of Georgia in the circuit court of Georgia. The defendant must have been either an alien or a citizen. If an alien, the court had jurisdiction. The judgment, then, must have been reversed, because the defendant might be "of Georgia," and yet a citizen of another state. This certainly does not prove what residence will constitute domicile or citizenship; but I think it does prove that it is not constituted by every residence. By the general laws of the civilized world, the domicile of the parents at the time of birth, or what is termed the domicile of origin, constitutes the domicile of an infant, and continues until abandoned or until the acquisition of a new domicile in a different place. As it gives political rights which are not lost by a mere change of domicile, it is recovered by any manifestation of a disposition to resume the native character; perhaps by a surrender of a new domicile. In fact, it may be considered rather as suspended than annihilated. All agree that a new residence is not acquired by a residence for temporary purposes. It must be a permanent residence. Vattel defines it to be "a habitation fixed in any place, with an intention of always staying there." The existence of this intention must be manifested by overt acts, in explanation of which, if doubtful, the declarations of the party will undoubtedly be received.

Let this rule be applied to the case at bar. Christopher Prentiss was born in Massachusetts, of which state his parents were citizens, and there he received his education and married a wife. He appears to have continued to reside in Massachusetts until the year 1801, when he came to Georgetown, in the District of Columbia, and joined Mr. Rind in editing a paper published in that place. In 1802 he sold his interest in that paper to Mr. Caldwell, and removed to Baltimore with his family, where he continued for some time as the editor of a paper. In 1803 he returned to Massachusetts, and leaving his wife with her father went himself to England. After his return in 1804 he was frequently in the District of Columbia, where he was employed to take the debates of congress for a printer in Philadelphia.

I think there is not much difficulty in determining that Mr. Prentiss was not a citizen of the District of Columbia. If he acquired a domicile in that place in 1801, he certainly abandoned it in 1802, when he sold his property and removed with his family to Baltimore. Whatever might have been his character when residing in Baltimore with his family, he certainly recovered his original domicile when he returned with his family to Massachusetts, and there is no ground to believe that his afterwards residing in the District of Columbia for the purpose of taking the debates was an abandonment of it.

It remains to inquire whether, at the emanation of this writ, he was a citizen of Virginia. It appears that he came to Richmond in March, 1805, and engaged, generally, with Mr. Davis as the editor of his paper. On the 18th of July he returned to Massachusetts, where he continued until the latter end of September, when he came to Virginia and resumed his employment with Mr. Davis. About the last of November in the same year, he left Mr. Davis, finally, and has since been occasionally in Massachusetts, where his family re-

sides, and occasionally in other states. I cannot think this residence in Richmond was "a habitancy, with an intention of staying here always." It continued for only a few months, a considerable part of which was passed in his native state, and his employment was one which he could abandon at any time. Had he acquired any property in the paper, the case would have been more doubtful, or had he remained in Richmond till this time, or until this question occurred, his residence would have assumed the appearance of permanence. Plea to the jurisdiction overruled.

BLAIR v. WESTERN FEMALE SEMINARY.

(Circuit Court for Ohio: 1 Bond, 578-580. 1864.)

Opinion by the COURT.

STATEMENT OF FACTS.—For some unexplained reason, this case has been pending in this court since the year 1858. It was brought by the plaintiff, as a citizen of Illinois, to recover an alleged balance due him on a contract for building the Western Female Seminary, an incorporated institution located at the town of Oxford, in Butler county. The defendant has at length appeared to the action, and has filed a plea to the jurisdiction of the court, on the ground that the plaintiff was a citizen of the state of Ohio at the time suit was brought, and has since continued to be such. The plaintiff has joined issue with the defendant, and the question of jurisdiction is the only one now before the court.

The evidence seems to be conclusive that the plaintiff, having previously resided with his family at Cincinnati, was unfortunate in business as a brick-maker and brick-layer; and in the year 1856 removed to Chicago, leaving his family here, with the intention of taking them to Chicago at a subsequent time and making it his permanent residence. His purpose, as he states in his testimony, in leaving his wife, was that his younger children might be educated at the high school in Cincinnati. He continued at Chicago, in pursuit of his business, until 1859, intending, up to that time, to remove his family and continue his residence permanently there. His wife, however, being opposed to living at Chicago, in 1859 he came back to Cincinnati. The testimony is satisfactory to prove his intention to have been, in going to Chicago, to make that place his home. It is also proved, by those who knew him intimately, that while absent he was regarded as having his residence at Chicago. And, in support of this conclusion, it is proved that while there he voted for two successive years, including the year in which this suit was commenced.

§ 1047. *What constitutes a change of domicile with reference to the jurisdiction of a circuit court.*

It is clear that in this state of facts the plea to the jurisdiction is not sustained. The plaintiff was a citizen of Illinois in 1858, when this suit was brought, having gone there without any intention of leaving, and having there exercised the right of voting as a citizen of that state. He was not, therefore, at that time a citizen of Ohio, and had an undoubted right to sue in this court. The fact that owing to his wife's opposition to living at Chicago, he subsequently left the place, does not prove he did not go there for a permanent settlement, nor that he was not a citizen of Illinois when this suit was brought. His subsequently formed purpose of leaving Chicago cannot affect or invalidate the evidence of his actual residence there at the time stated. Neither does

the fact of his leaving a part of his family at Cincinnati, under the circumstances proved, negative the fact of citizenship in Illinois. 6 How., 163, 185; 14 id., 422. The plea to the jurisdiction is overruled.

CASE *v.* CLARKE.

(Circuit Court for Rhode Island: 5 Mason, 70, 71. 1828.)

§ 1048. *To effect a change of citizenship, there must be a bona fide change of domicile.*

Opinion by STORY, J.

It appears to me very clear that there is no sufficient proof that the plaintiff is a citizen of Massachusetts. To effect that purpose it should be established that there was a *bona fide* change of domicile. I do not say that we can inquire into the motives for the change or the reasons which influence a man to remove from one state to another. Be these motives or reasons what they may, there must still be a *bona fide* intention of removal and a real change of domicile. If a person wishing to commence suits in the courts of the United States instead of the state courts chooses to remove into another state and executes such intention *bona fide*, he may thereby change his citizenship. But his removal must be a real one, *animo manendi*, and not merely ostensible. Now in the present case, no person can wink so hard as not to see that the plaintiff never had any intention to change his domicile. He went to Troy upon a mere temporary visit, for a transient purpose, and apparently for the sole purpose of suing out and serving the present process. He returned as soon as the service was completed; and resumed his business as usual. How can such acts, construing them most favorably for him, demonstrate any intentional change of his common domicile? As well might a man passing into another state in the progress of a journey of business or pleasure claim to be a citizen of such state. There must be some plain overt acts establishing a real removal of domicile. The return here followed too soon upon the removal not to demonstrate that it was merely an ostensible, and not a real, change of domicile. I, for one, feel no desire to encourage attempts of this nature; and am willing that the state courts should retain all the jurisdiction over causes originating between citizens of the same state.

Verdict for the defendant.

CATLIN *v.* GLADDING.

(Circuit Court for Rhode Island: 4 Mason, 308, 309. 1826.)

STATEMENT OF FACTS.—This was an action of *assumpsit* on a promissory note. There was a plea to the jurisdiction, to the effect that the defendant was not a citizen of Rhode Island, as set forth in the writ. The facts as to residence and citizenship are stated in the opinion.

§ 1049. *Domicile, how determined.*

Opinion by STORY, J.

The opinion of the court is that the defendant is a citizen of Rhode Island, and that the plea is not maintained. His birth was in that state; the family estate is there, and his mother remains on it. The defendant is unmarried. While he was resident at New York in business, he may be deemed to have acquired a citizenship there, as he probably intended a permanent domicile.

But when the house failed, he gave up his residence in New York and returned to his mother's family. Under such circumstances he must be presumed to have regained the family domicile, and to have returned to his native allegiance. The native character and domicile easily reverts; and fewer circumstances are necessary to establish it than that of a foreign domicile. Upon his return from New York, he re-acquired his native citizenship. What evidence is there that he has since changed it? It does not appear that he had any intention of becoming a citizen of Connecticut. For aught in the case, his engagement may be merely temporary, until he can get other business, and without any intention of changing his domicile. The case might have been different if he had had a family and removed with them into Connecticut. Such an act would afford *prima facie* evidence of a change of permanent domicile. The judgment must therefore be for the plaintiff.

Judgment accordingly.

§ 1050. **Intention.**—When a citizen of one state removes to another, the question whether he becomes a citizen of the new state depends upon his intention. If he intends to make a permanent residence there he becomes a citizen. This intention may be shown by his declarations accompanying the act of removal, or by facts which indicate such intention, such as buying land, removing his family, planting crops, etc. *Burnham v. Rangeley*, 1 Woodb. & M., 8. See §§ 1039, 1043.

§ 1051. If one removes from one state into another with the intention of making his permanent residence in the latter, he becomes a citizen of the latter state. Facts from which such intention may be inferred by the jury. *Read v. Bertrand*, 4 Wash., 517.

§ 1052. — **temporary absence.**—Citizenship, when used in the constitution in regard to the jurisdiction of the United States courts, means residence. If a citizen of one state wishes to change his domicile and remove himself and family into another state, with a *bona fide* intention of abandoning his former place of residence and to become an inhabitant of the state to which he removes, he becomes an inhabitant of that state immediately on his removal. If, after so removing and beginning a suit in a federal court by virtue of the citizenship so acquired, he moves back to the first state, this fact may go to the jury to show that his removal was not *bona fide*. *Cooper v. Galbraith*, 3 Wash., 553.

§ 1053. In order to bring a suit in the circuit court of the United States in a state in which the plaintiff has always been a resident, he must have abandoned his residence in such state and actually moved to another state with a *bona fide* intention of becoming an inhabitant and resident of the state to which he has moved. A temporary return for temporary purposes does not revive the former citizenship. *Kemma v. Brockhaus*,* 5 Fed. R., 762.

§ 1054. — **right to vote.**—A person who removes from one state to another, with the intention of permanently residing there, becomes a citizen of that state immediately, so far as the jurisdiction of the United States courts is concerned, though he may not be allowed to vote in state elections for some time. *Burnham v. Rangeley*, 1 Woodb. & M., 12.

§ 1055. **Temporary absence.**—When a citizen of one state removes into another, with a view to settle, buys land and pays taxes, he is a citizen of that state, so far as the jurisdiction of the United States courts is concerned, and a temporary absence in another state will not destroy that citizenship. *Knox v. Greenleaf*, 4 Dal., 362.

§ 1056. Where one removes from one state into another before any idea of prosecuting a certain claim at law could have entered his mind, and while so removed brings suit on that claim in the federal court, relying upon citizenship to give jurisdiction, the fact that he shortly afterwards removes back to the same state which he before left, and in which the defendant lives, does not necessarily show that his removal was fraudulent, to acquire a right to sue in the federal court. *Castor v. Mitchel*, 4 Wash., 192.

§ 1057. **Change of residence to acquire a right to sue.**—The citizenship of a party to a suit in a federal court is supported, for jurisdictional purposes, by proof of a permanent and fixed residence in a place, so that he has a domicile there. He need not have already acquired all the rights and privileges of a citizen of that state. If he removes from one state into another for the sole purpose of gaining such citizenship as will enable him to sue in the federal courts, yet if he does it as a permanent removal (of which the jury must judge), this is not a fraud upon the court and will not deprive him of the right to sue. *Catlett v. Pacific Ins. Co.*, 1 Paine, 610. See § 1041.

§ 1058. In reference to the jurisdiction of the United States courts, citizenship means domicile, home, permanent residence. If one leaves a state with an intention of perma-

nently residing in another state, though he does this in order to get the right to sue in a federal court, still he may so sue. *Gardner v. Sharp*, 4 Wash., 614.

§ 1059. **Married woman.**—The general rule that a married woman's domicile is the same as that of her husband ceases with divorce. If after that she actually resides in a different state from the one of which he is a citizen, she may maintain a process of *habeas corpus* for her child against him in the federal courts. *Bennett v. Bennett*, Deady, 305. See §§ 856, 857.

§ 1060. When a woman is divorced from her husband and the custody of the child is decreed to her, but the husband wrongfully abducts the child, if the wife is a citizen of a different state from her husband the United States district court has jurisdiction (under 1 U. S. Stat., 81) of a writ of *habeas corpus* to take the child from the husband. *Ibid.*

§ 1061. **Division of court.**—A citizen of Massachusetts removed to London, and there joined in partnership with a mercantile firm. A few years later, while he was still a member, the firm brought a suit in the circuit court for Massachusetts against a citizen of that state, and it was objected that the court had no jurisdiction. The court were divided in opinion and certified the case to the supreme court, who were also divided. The circuit court proceeded with the case. *Wildes v. Parker*,* 3 Sumn., 593.

§ 1062. **Miscellaneous.**—When one was sued as a citizen of Louisiana and denied his citizenship, proof that he with his wife had lived in the state two years, during which time he had been absent but once, and that on a brief visit, that he had occupied himself in cultivating a plantation in which he claimed part ownership, that he had erected a dwelling-house, and had once admitted that he considered himself a citizen, was held sufficient proof of his citizenship although he had never voted in the state. *Shelton v. Tiffin*,* 6 How., 163.

§ 1063. *Quære*, whether an American citizen, domiciled for commercial purposes in a foreign country, is to be deemed an alien, so as to be able to sue in the federal courts a citizen of his native state? *Wildes v. Parker*,* 3 Sumn., 595.

§ 1064. A citizen of the United States, an unmarried man, having no family, lived in Boston in lodgings hired by the year, and was in his lodgings about two-thirds of the year. The rest of the time he was absent on business of the firm of which he was a partner, traveling in New York and other places. Many witnesses testified that they considered his home to be in Boston. It was held that for jurisdictional purposes he was a citizen of Massachusetts. *Rabaud v. D'Wolf*, 1 Paine, 588.

(3) Averments.

[See PLEADING.]

SUMMARY—*Averments, where to be found*, § 1065.—*Residence is not citizenship*, § 1066.—*Averment in the caption not sufficient*, § 1067.—*Residence and citizenship*, § 1068.—*Averments as to corporations*, §§ 1069-72.—*Averments of citizenship*, §§ 1073-74.—*Averment in a joinder in demurrer allowed under the circumstances*, § 1075.—*Averment of residence within district unnecessary*, § 1076.—*Averment of citizenship of assignor*, §§ 1077-78.—*Citizenship of joint promisor to be averred*, § 1079.

§ 1065. Although the necessary averments of citizenship need not always appear in the pleadings, yet the facts cannot be gathered from various papers not a legitimate part of the record. *Robertson v. Cease*, §§ 1080-82. See § 1113.

§ 1066. The fourteenth amendment to the constitution does not render an averment of residence equivalent to an averment of citizenship. *Ibid.*

§ 1067. A statement of the citizenship of the parties in the caption of the bill is not a sufficient averment to give the court jurisdiction. *Jackson v. Ashton*, §§ 1083-84.

§ 1068. An averment of residence is not an averment of citizenship. *Ibid.*

§ 1069. An averment that the defendant corporation is "a body politic in the law of and doing business in" a state is insufficient as an averment of citizenship in that state. *Pennsylvania v. Quicksilver Co.*, § 1085.

§ 1070. In a suit brought by an alien against the "Pennsylvania R. Co.," there being no averment that the defendant was a corporation, a citizen of a particular state, or an alien, the circuit court has no jurisdiction. *Piquignot v. Pennsylvania R. Co.*, § 1086.

§ 1071. A description of a foreign corporation as "doing business and resident in the state of New York" is a sufficient averment of its citizenship. *Railroad Co. v. Shepard*, § 1087.

§ 1072. Although it is ordinarily requisite to describe a corporation as "duly incorporated under the laws" of a certain state, etc., yet, when the existence and domicile of the corporation are judicially known to the court, it is sufficient to aver that the company "are citizens" of the state. *Drawbridge Co. v. Shepherd*, §§ 1088-89.

§ 1073. An averment that defendant is a citizen of the United States, naturalized in Louisiana, and residing there, is equivalent to an averment that he is a citizen of that state. *Gassies v. Ballon*, § 1090.

§§ 1074-1080. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1074. An averment that plaintiff is a citizen of Maryland, and defendant a citizen or resident of Louisiana, holding there his fixed and permanent domicile, does not give jurisdiction to the circuit court; and a plea that both are citizens of Louisiana does not aid the matter as an admission, since the whole averment must be taken together. *Brown v. Keene*, §§ 1091, 1092.

§ 1075. Where in a declaration a necessary averment of citizenship was omitted, but subsequently in a joinder in demurrer it was inserted, this was held sufficient in view of the peculiar circumstances of the case. *Bradstreet v. Thomas*, § 1093.

§ 1076. In a suit brought in the southern district of Ohio, an averment that defendant is a citizen of Ohio is sufficient without averment of his residence in the district. *Vore v. Fowler*, §§ 1094-95.

§ 1077. To make out a *prima facie* case in a suit by an assignee of a lease against the lessee, the citizenship of the assignor at the time of suit brought must be shown. *Bradley v. Rhines*, §§ 1096-97.

§ 1078. In a suit on a note by an indorser, the citizenship of the payee is a jurisdictional fact which must appear on the record. *Turner v. Bank of North America*, § 1098.

§ 1079. The citizenship of a joint promisor who is not served with process must appear on the record in a suit in the circuit court. *Bargh v. Page*, § 1099.

[NOTES.— See §§ 1100-1145.]

ROBERTSON *v.* CEASE.

(7 Otto, 646-651. 1878.)

ERROR to U. S. Circuit Court, Western District of Texas.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.— This action was instituted on the 25th of September, 1873, by Cease, as the assignee of a note for \$4,190, executed in Texas by Robertson, plaintiff in error, on the 2d of October, 1860, and made payable July 1, 1861, to the order of W. J. Chamblin, with interest at the rate of ten per cent. per annum from date. Does it sufficiently appear from the record that the case is within the jurisdiction of the circuit court? That is the first question to be considered upon this writ of error.

The payee, Chamblin, a citizen of Illinois, died in that state on the 29th of April, 1871. In September, 1873, the note sued on was assigned by his administrators to Cease. It appears from the pleadings that the heirs and administrators of Chamblin were also citizens of Illinois, both when the note was assigned to Cease and at the commencement of this action. It is also averred that Robertson, when sued, was a citizen of Texas, but there is no allegation as to the citizenship of Cease. The averment as to him is, that he "resides in the county of Mason and state of Illinois." It is, however, claimed by counsel to be apparent, or to be fairly inferred from certain documents or papers copied into the transcript, that Cease was, at the commencement of the action, a citizen of Illinois. One of those documents is a written notice, served by Robertson upon Cease's attorneys, that he would apply for a commission to examine as witnesses, in support of the plea in abatement, "Chamblin, Winn and Henry Cease, citizens of the county of Mason, state of Illinois." The commission which issued, under that notice, from the clerk's office, directed the examination of these witnesses, who are in that document also described as citizens of Illinois. The other document referred to is the deposition of Cease, which opens thus: "My name is Henry Cease; residence, Mason county, Illinois; age, fifty-two years; occupation, grain dealer and farmer."

§ 1080. *Although the jurisdictional facts need not always appear in the pleadings, they cannot be collected from papers not properly a part of the record.*

It is the settled doctrine of this court that, in cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the facts essential

to support that jurisdiction must appear somewhere in the record. Said the chief justice in *Railway Co. v. Ramsey*, 22 Wall., 322: "They need not necessarily, however, be averred in the pleadings. It is sufficient, if they are, in some form, affirmatively shown by the record." That view was approved in the subsequent case of *Briges v. Sperry*, 95 U. S., 401. Under the doctrine of these cases it is contended that the citizenship of Cease in Illinois is satisfactorily shown by the foregoing documents, which, it is insisted, are a part of the record upon this writ of error. But this position cannot be maintained. It involves a misapprehension of our former decisions. When we declared that the record, other than the pleadings, may be referred to in this court, to ascertain the citizenship of parties, we alluded only to such portions of the transcript as properly constituted the record upon which we must base our final judgment, and not to papers which had been improperly inserted in the transcript. Those relied upon here to supply the absence of distinct averments in the pleadings as to the citizenship of Cease, clearly do not constitute any legitimate part of the record. They are not so made either by a bill of exceptions, or by any order of the court referring to them, or in any other mode recognized by the law. As there is nothing to show that the deposition of Cease, or the commission or notice under which it was taken, was before the jury or the court for any purpose, during the trial, no fact stated in them can be made the foundation of any decision we might render, either upon the merits or the question of jurisdiction. Looking, then, at the pleadings, and to such portions of the transcript as properly constitute the record, we find nothing beyond the naked averment of Cease's residence in Illinois, which, according to the uniform course of decisions in this court, is insufficient to show his citizenship in that state. Citizenship and residence, as often declared by this court, are not synonymous terms. *Parker v. Overman*, 18 How., 137.

§ 1081. *The fourteenth amendment to the constitution does not render an averment of residence equivalent to an averment of citizenship.*

In the oral argument before this court, the inquiry arose, whether since the adoption of the fourteenth amendment to the federal constitution the mere allegation of residence in Illinois did not make such a *prima facie* case of citizenship in that state as, in the absence of proof, should be deemed sufficient to sustain the jurisdiction of the circuit court. That amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state where they reside." It was suggested that a resident of one of the states is *prima facie* either a citizen of the United States or an alien,—if a citizen of the United States, and also a resident of one of the states, he is, by the terms of the fourteenth amendment, also a citizen of the state wherein he resides,—and if an alien he was entitled in that capacity to sue in the federal court, without regard to residence in any particular state. It is not to be denied that there is some force in these suggestions, but they do not convince us that it is either necessary or wise to modify the rules heretofore established by a long line of decisions upon the subject of the jurisdiction of the federal courts. Those who think that the fourteenth amendment requires some modification of those rules claim, not that the plaintiff's residence in a particular state necessarily or conclusively proves him to be a citizen of that state, within the meaning of the constitution, but only that a general allegation of residence, without indicating the character of such residence, whether temporary or permanent, made

a *prima facie* case of right to sue in the federal courts. As the jurisdiction of the circuit court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, the presumption now, as well as before the adoption of the fourteenth amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record. And so where jurisdiction depends upon the alienage of one of the parties. In *Brown v. Keene*, 8 Pet., 115 (§§ 1091-92, *infra*), Mr. Chief Justice Marshall said: "The decisions of this court require that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments." Here the only fact averred, or appearing from the record, is that Cease was a resident of Illinois; and we are, in effect, asked, in support of the jurisdiction of the court below, to infer argumentatively, from the mere allegation of "residence," that, if not an alien, he had a fixed, permanent domicile in that state, and was a native or naturalized citizen of the United States, and subject to the jurisdiction thereof. By such argumentative inferences, it is contended that we should ascertain the fact, vital to the jurisdiction of the court, of his citizenship in some state other than that in which the suit was brought. We perceive nothing in either the language or policy of the fourteenth amendment which requires or justifies us in holding that the bare averment of the residence of the parties is sufficient, *prima facie*, to show jurisdiction. The judgment must, therefore, be reversed, upon the ground that it does not affirmatively appear from the record that the defendant in error was entitled to sue in the circuit court.

§ 1082. *An amendment to the pleadings, making proper averments of citizenship, does not introduce a new cause of action.*

The plaintiff in error insists that the reversal should be with directions to dismiss the petition, since he contends that an amendment of the pleadings, stating the citizenship of Cease would be, in legal effect, a new suit, asserting a new cause of action, which would be barred by the statute of limitations. But it is clear that an amendment of that nature could not be so regarded, either upon principle or authority. It would introduce no new cause of action. It would only show, if its allegations as to citizenship are true, that the court had jurisdiction, from the commencement of the litigation, of the cause of action set out in the original petition. Whether after such an amendment the action would be barred by limitation would depend upon the time which had elapsed before the filing of the original petition, and not upon the time which had elapsed previous to the amendment. The allowance of such an amendment, under the circumstances of this case, is sustained by the former practice of this court. In *Morgan v. Gay*, 19 Wall., 81, the judgment of the court below was reversed because it did not affirmatively appear that the citizenship of the parties was such as to give it jurisdiction; and the cause was sent back "that amendment may be made in the pleadings, showing the citizenship of the indorser of the bills, if it be such as to give the court jurisdiction of the case." Such a course is peculiarly proper in this case, in view of the failure of the plaintiff in error to make, in the court below, the precise question of jurisdiction which he urges upon our considera-

tion. He filed, it is true, a plea to the jurisdiction of the circuit court; but it did not impeach its jurisdiction upon the distinct ground that Cease did not appear to be a citizen of the state in which he resided. His denial of jurisdiction was upon the ground that the assignment to Cease was merely colorable, and for the fraudulent purpose of dispensing with letters of administration upon Chamblin's estate in Texas, thereby enabling a suit to be brought in the court below in the name of the assignee, but really for the use and benefit of that estate. The parties, as we infer from the record, went to trial before the jury without any real controversy as to the citizenship of Cease being in Illinois. After verdict Robertson moved in arrest of judgment upon the general ground that there was "no cause of action stated in plaintiff's petition of which this court can take cognizance, and because it appears from the face of the pleadings that this court has no jurisdiction of the cause." But we cannot feel sure, from this general language, or from anything in the record, that attention was called in the court below to the defect in the pleadings to which our attention has been specially directed. For these reasons the defendant in error should be allowed to amend the petition in respect to his citizenship at the commencement of the action, if his citizenship was then such as to authorize the court to proceed with the trial.

The assignment of errors embraces other questions, as to which we withhold any expression of opinion. Since the record shows no case of which the circuit court had jurisdiction, we do not feel at liberty, upon this writ of error, to determine any point affecting the merits of the litigation. The judgment of the circuit court must, therefore, be reversed, with directions to grant a new trial, and for such further proceedings as may be in conformity to this opinion; and it is so ordered.

JACKSON *v.* ASHTON.

(8 Peters, 148, 149. 1834.)

APPEAL from U. S. Circuit Court, District of Pennsylvania.

STATEMENT OF FACTS.—In the caption of the bill in this case the complainants were described as citizens of Virginia, and the defendant as a citizen of Pennsylvania. In the bill it was alleged that the complainants were citizens of Virginia, but the defendant was described as "William E. Ashton, of the city of Philadelphia."

§ 1083. *A statement of the citizenship of the parties in the caption of the bill is not sufficient to give jurisdiction.*

Opinion by MARSHALL, C. J.

The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case.

§ 1084. *An averment of residence is not an averment of citizenship.*

The only difficulty which could arise to the dismissal of the bill presents itself upon the statement "that the defendant is of Philadelphia." This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question, the court might decide otherwise; but the decision of the court, in cases which have heretofore been before it, has been express upon the point; and the bill must be dismissed for want of jurisdiction.

PENNSYLVANIA *v.* QUICKSILVER COMPANY.

(10 Wallace, 553-556. 1870.)

STATEMENT OF FACTS.—The state of Pennsylvania sued the Quicksilver Company in the supreme court, alleging in the declaration that the defendant was a body politic in the law of, and doing business in, the state of California. Motion to dismiss.

§ 1085. *An averment that the defendant corporation is "a body politic in the law of, and doing business in," California is insufficient as an averment of citizenship.*

Opinion by MR. JUSTICE NELSON.

By the second section of the third article of the constitution, it is ordained that the judicial power shall extend "to all controversies between a state and the citizens of another state." The second clause of this section provides "that in all cases affecting ambassadors, etc., and those in which a state shall be a party, the supreme court shall have original jurisdiction. . . . In all other cases before mentioned it shall have appellate jurisdiction."

This second clause distributes the jurisdiction conferred upon the supreme court in the previous one into original and appellate jurisdiction; but does not profess to confer any. The thirteenth section of the judiciary act, which provides for the jurisdiction of this court, accords with this construction. A state, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another state, but not against one of her own. And the question in this case is whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California. And this turns upon another question, and that is, whether the averment there imports that the defendant is a corporation created by the laws of that state; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on this subject. *Marshall v. The Baltimore & Ohio R. Co.*, 16 How., 314, and cases there cited (CONTRACTS, §§ 555-62).

The court is of opinion that this averment is insufficient to establish that the defendant is a California corporation. It may mean that the defendant is a corporation doing business in that state by its agent; but not that it had been incorporated by the laws of the state. It would have been very easy to have made the fact clear by averment, and, being a jurisdictional fact, it should not have been left in doubt. Indeed, it was admitted in the argument that the defendant was a Pennsylvania corporation, and the jurisdiction sought to be sustained by a suit against this agency. We have already shown that this is unavailable to support the jurisdiction. Motion granted, and the writ dismissed.

PIQUIGNOT *v.* PENNSYLVANIA RAILROAD COMPANY.

(16 Howard, 104-106. 1853.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The caption of this suit and the declaration describe the plaintiff as a citizen of France, but contain no averment as to the citizenship of the defendant. Nor does it state whether "The Pennsylvania Railroad Company" is a corporation or a private association, or the name of an individual. The declaration avers that the defendants are transporters of emigrants

for hire, and undertook to convey the plaintiff and his wife from Philadelphia to Pittsburg, but did it in such a negligent and careless manner that his wife was frozen to death on her passage. The defendant pleaded in abatement another action pending for the same cause of action between the same parties, in the district court of Alleghany county. To this plea the plaintiff demurred, and the court gave "judgment upon the demurrer in favor of the defendants." Whereupon the plaintiff brought this writ of error.

The question raised by the plea in abatement in this case is one of considerable importance, and on which there is some conflict of opinion and decision, but the judgment of the court below on the plea is not subject to our revision on a writ of error. The twenty-second section of the judiciary act, which defines what decrees or judgments in civil actions may be made the subjects of appeals or writ of error, provides "that there shall be no reversal on such writ of error for error in ruling any plea in abatement other than a plea to the jurisdiction of the court." The question of jurisdiction has not been made the subject of plea or exception, nor is it necessary where it is patent on the face of the record. The judgment of the court, so far as the record is concerned, does not distinctly show whether the court quashed the writ on the plea in abatement or dismissed the suit for want of jurisdiction, as it might well have done. In Pennsylvania it is not usual to make a record of the judgment in legal form. The word "judgment" for the party in whose favor it is, being the usual minute made by the clerk, from which a formal record of judgment may be made, but seldom or ever is made. It stands as a symbol to represent what the judgment ought to be, and therefore can never be erroneous. But there is no necessity that the courts of the United States should follow such careless precedents.

§ 1086. *Where plaintiff is an alien and the citizenship of the defendants is not stated, nor that they constitute a corporation, the federal courts have no jurisdiction.*

On a demurrer the court will look to the first error in pleading, and if the declaration does not show that the court has jurisdiction of the parties, it may dismiss the cause on that ground. In this case the declaration states the plaintiff to be a citizen of France, but gives no character as to the citizenship of the defendant. The name is most probably not intended to designate an individual; if not, the record does not state that it is a corporation incorporated by the laws of Pennsylvania, or having its place of business there, or that its corporators, managers or directors are citizens of Pennsylvania, nor can the want of such averment be supplied by inference from the name. It is true the act of congress (1 Stats. at Large, 73) describes the jurisdiction of the court to be "where an alien is a party," without describing the character of the other party; and the pleader may have been led into the error by looking no further. But the constitution, which is the superior law, defines the jurisdiction to be "between citizens of a state and foreign states, citizens or subjects;" and although it has been decided (*Mason v. The Blaireau*, 2 Cranch, 264) that the courts of the United States will entertain jurisdiction where all the parties are aliens, if none of them object to it, yet it does not appear in this case that the defendant is an alien.

It follows, therefore, that whatever construction be put on this record, the judgment of the court below must be affirmed.

NEW YORK & ERIE RAILROAD *v.* SHEPARD.

(Circuit Court for Ohio: 5 McLean, 455. 1853.)

Opinion by the COURT.

STATEMENT OF FACTS.—The declaration states, the New York & Erie Railroad, doing business and resident in the state of New York, plaintiffs, complain, etc. The defendants demurred on the ground that there was no sufficient allegation of citizenship to give jurisdiction to the court.

§ 1087. *What is a sufficient averment of citizenship in case of a corporation.*

Where a corporation of another state sues in this court, an allegation of citizenship is not now necessary, as was formerly required. The state where the corporation is located and in which its corporate functions are exercised, if alleged, is sufficient to give jurisdiction. The demurrer is overruled.

COVINGTON DRAWBRIDGE COMPANY *v.* SHEPHERD.

(20 Howard, 227-234. 1857.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The writ of error in this case is brought upon a judgment recovered by Shepherd and others against the Covington Drawbridge Company, in the circuit court of the United States for the district of Indiana.

The only error assigned here is that, upon the declaration and pleadings in the case, the circuit court had no jurisdiction. This objection is founded upon the description of the parties in the declaration, which is in the following words: "Alexander O. Shepherd, Elijah F. Gillan, James Davidson, Samuel McClure, Samuel Peters and George Willard, citizens of the state of Ohio, plaintiffs in this suit, complain of the Covington Drawbridge Company, citizens of the state of Indiana, defendants in this suit, in a plea of trespass on the case."

The plaintiff in error, who was defendant in the court below, contends that it does not appear by this averment that the Drawbridge Company was a corporation chartered by Indiana, and had its principal place of business in that state; and that, unless this appears in the pleadings, the averment that they were citizens of that state was not sufficient to give jurisdiction to the circuit court. It is very true, that where individuals voluntarily associate together, and adopt a name or description intended to embrace all of its members, and under which its contracts and engagements are made, and its business carried on, such a company can neither sue nor be sued by the name they have adopted, and under which they act, in any court of common law, whether it be the court of a state or of the United States. They must sue and be sued in their individual names as partners in the company.

§ 1088. *The court will take judicial notice of an act of incorporation where the constitution of the state provides that every statute shall be a public law.*

But the answer to the objection taken by the plaintiff in error is, that the twenty-seventh section of the fourth article of the constitution of Indiana provides that "every statute shall be a public law, unless otherwise declared in the statute itself." The statute of the legislature of Indiana, incorporating the Covington Drawbridge Company, is therefore a public law, of which the circuit court and this court are bound to take judicial notice, without its being pleaded or offered in evidence. For wherever a law of a state is held to be a public one, to be judicially taken notice of by the state courts, it must be re-

garded in like manner by a court of the United States, when it is required to administer the laws of the state.

§ 1089. *When the existence and domicile of a corporation are judicially known to the court, an allegation that the company are citizens of a certain state is sufficient for jurisdictional purposes. Authorities reviewed.*

This being the case in this instance, the averment that the Covington Drawbridge Company are citizens of the state of Indiana is sufficient, according to the decisions of this court in the case of *The Louisville R. Co. v. Letson*, 2 How., 497 (§§ 1346–50, *infra*), which has ever since been adhered to, and must now be regarded as the settled law of the court. The question as to the jurisdiction of the courts of the United States, in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of *The Hope Insurance Co. v. Boardman*, 5 Cranch, 57, and of *The Bank of the United States v. Deveaux*, 5 Cr., 61 (§§ 1344–45, *infra*). These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And, in the last-mentioned case, the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment.

But in the case of *The Louisville R. Co. v. Letson*, the court overruled so much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiffs or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it. And that, inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicile of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the state from which this legal being derived its existence, and its faculties and powers. And in the case of *The Bank of Augusta v. Earle*, 13 Pet., 519, the court said that a corporation can have no legal existence outside of the dominion of the state by which it is created. Consequently, the Covington Drawbridge Company being chartered by the state of Indiana, it necessarily has its home and place of business in that state; and the only averment in the declaration necessary to show a case for jurisdiction was that of the citizenship of the parties who composed the company.

In the case of *The Lafayette Insurance Company v. French*, the declaration stated that the corporation itself was a *citizen* of Indiana. Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a state in the sense in which that word is used in the constitution of the United States, and the averment was rejected because the matter averred was simply impossible. But it appeared from other parts of the pleadings that the corporation was chartered by Indiana, and had its principal place of business in that state. And the court, therefore, applied the

principle decided in the case of *The Louisville R. Co. v. Letson*, and held that the members of the corporate body must be presumed to be citizens of the same state. The citizenship of the corporators was regarded as the necessary and legal consequence of the facts stated in the pleadings, without any positive and direct averment to that effect. The case of *Marshall against the Baltimore & Ohio Railroad Company* was decided upon the same ground. But in the case before us, the citizenship of the corporators is not left to be inferred by the court from other facts stated in the pleadings, but is directly and positively averred, and consequently freed from all objection on that head. Indeed, it is the same form of pleading in this respect that was used in the case of *The Bank of the United States v. Deveaux*, and which this court ruled to be good.

If the act of incorporation had not been a public law, which the court is bound to notice, then, undoubtedly, the proper description of the defendants would have been, "The Covington Drawbridge Company, citizens of the state of Indiana, incorporated by that name, by the said state, and having their principal place of business therein." But in the case before us, the averment of the citizenship of the members of the corporation is all that is required, because the existence and domicile of the corporate body is judicially known to the court.

The judgment of the court below is therefore affirmed.

MR. JUSTICE CAMPBELL concurred in the result of the opinion of the court. MR. JUSTICE DANIEL dissented, holding that a corporation is not citizen.

GASSIES *v.* BALLON.

(6 Peters, 761, 762. 1832.)

ERROR to U. S. District Court, Eastern District of Louisiana.

§ 1090. *An allegation that defendant is a naturalized citizen residing in Louisiana is a sufficient averment of citizenship.*

Opinion by MARSHALL, C. J.

In this case, the court is of opinion that the jurisdiction can be sustained. The defendant in error is alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana, and residing there. This is equivalent to an averment that he is a citizen of that state. A citizen of the United States, residing in any state of the Union, is a citizen of that state. The authorities on this question have gone far enough; and this court is not disposed to narrow any more the limitations which have been imposed by the decided cases. They have gone as far as it would be reasonable and proper to go. The judgment of the district court of Louisiana is affirmed.

BROWN *v.* KEENE.

(8 Peters, 112-116. 1834.)

§ 1091. *An averment that defendant is a citizen or resident of Louisiana, holding his fixed and permanent domicile there, is not a sufficient averment of citizenship.*

Opinion by MARSHALL, C. J.

This appeal is from a decree of the court of the United States for the district of Louisiana. The first error assigned in the proceedings is, that the peti-

tion, which, in the practice of Louisiana, is substituted for a declaration, does not show, with sufficient certainty, that the parties were within the jurisdiction of the court. If this objection be well founded it is undoubtedly fatal.

The petition avers that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland; and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles. The petition, then, does not aver positively that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment he may be either. The additional words of description, "holding his fixed and permanent domicile in the parish of St. Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicile; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the court is sufficiently shown by these averments. The constitution extends the judicial power to "controversies between citizens of different states;" and the judicial act (1 Stats. at Large, 73) gives jurisdiction "in suits between a citizen of the state where the suit is brought, and a citizen of another state."

The decisions of this court require that the averment of jurisdiction shall be positive — that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments. In *Bingham v. Cabot*, 3 Dal., 382, the court held clearly, that it was necessary to set forth the citizenship (or alienage, when a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the court, and that the record was, in that respect, defective. In *Abercrombie v. Dupuis*, 1 Cranch, 343, the plaintiffs below aver "that they do severally reside without the limits of the district of Georgia, to wit, in the state of Kentucky." The defendant is called "Charles Abercrombie, of the district of Georgia, aforesaid." The judgment in favor of the plaintiff below was reversed on the authority of the case of *Bingham v. Cabot*.

In *Wood v. Wagnon*, 2 Cranch, 9, the judgment in favor of the plaintiff below was reversed because his petition did not show the jurisdiction of the court. It stated the plaintiff to be a citizen of the state of Pennsylvania, and James Wood, the defendant, to be "of Georgia, aforesaid." *Capron v. Van Noorden*, 2 Cranch, 126, was reversed because the declaration did not state the citizenship or alienage of the plaintiff in the circuit court. The same principle has been constantly recognized in this court.

§ 1092. *If an averment of citizenship in the plea be relied upon as an admission, the whole averment must be taken together.*

The answer of James Brown asserts that both plaintiff and defendant are citizens of the state of Louisiana. Without indicating any opinion on the question whether any admission in the plea can cure an insufficient allegation of jurisdiction in the declaration, we are all of opinion that this answer does not cure the defect of the petition. If the averment of the answer may be looked into, the whole averment must be taken together. It is, that both plaintiff and defendant are citizens of Louisiana. The decree of the court for the district of Louisiana is to be reversed, that court not having jurisdiction; and the appeal to be dismissed. The cross appeal, *Keene v. Brown*, is to be dismissed, the court having no jurisdiction.

BRADSTREET v. THOMAS.

(12 Peters, 59-65. 1838.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—A motion has been made by the defendant in error to dismiss this case, upon the ground that the averments necessary to give jurisdiction to the courts of the United States do not appear in the record. The decisions which have heretofore been made on this subject render it proper that the circumstances under which this motion comes before the court should be stated.

A writ of right was brought in the district court for the northern district of New York, to recover certain lands situated in the state of New York. The demandant, in her declaration, avers that she is an alien, and a subject of the king of the United Kingdom of Great Britain and Ireland; but does not aver that the tenant is a citizen of the state of New York, or of any other state of the United States. The suit was brought to January term, 1825, at which term the tenant appeared, and prayed leave to imparle until the next term; "saving all objections as well to the jurisdiction of the court as to the writ and count." The case was continued from term to term, until August term, 1826, when the tenant put in the usual plea to the first count, and demurred to the second and third; setting down special causes of demurrer. The demandant joined in the *mise* on the plea, and joined in the demurrer; and, in her joinder in demurrer, she averred that the defendant was a citizen of the state of New York. The want of this averment of citizenship in the counts was not one of the causes of demurrer assigned by the tenant. The demurrers were decided against the demandant at August term, 1827; and further proceedings were had which it is unnecessary to state here, and the case continued until August term, 1831, when the defendant moved the court to dismiss the suit for want of jurisdiction; assigning, as the foundation of this motion, the want of an averment of the pecuniary value of the lands demanded in the counts filed by the demandant.

The court sustained the motion, and dismissed the suit. But at that time no objection to the jurisdiction was made on account of the omission to aver the citizenship of the tenant. In 1832 this dismissal of the suit was brought before the supreme court, and a rule laid on the district court to show cause why the case should not be reinstated in that court; and at January term, 1833, a peremptory *mandamus* was issued by this court, commanding the district court to reinstate the suit, and "to proceed to try and adjudge according to the law and right of the case, the said writ of right and the *mise* therein joined." The *mandamus* was obeyed and the cause reinstated, and the *mise* tried and found against the demandant, and judgment entered against her at November, 1837. The case is now before us upon a writ of error on this judgment, and a motion is made to dismiss the case, upon the ground that neither the district court nor this court could have jurisdiction of the suit; because the demandant is an alien, and there is no averment that the tenant was a citizen of New York.

§ 1093. *Where a necessary averment was omitted in the declaration, but appeared in a joinder in demurrer without objection, this was sufficient under the circumstances of the case.*

The above statement of the proceedings makes it evident that the dismissal of the suit, upon this ground, at this time, would be a surprise upon the de-

mandant, who has been prosecuting the suit for many years; most probably under the impression that the averment of citizenship contained in her joinder in demurrer was considered by this court and by the district court to be a sufficient compliance with the rules of pleading established by the decisions of this court. For the averment in question was received in the district court without objection; and, indeed, would seem to have been regarded as sufficient by that court; because, when the suit was dismissed there, upon the ground that the counts did not contain proper averments to give jurisdiction, no notice was taken of the want of this averment in the counts, nor any objection to the place where it had been inserted in the pleadings; and when the case was brought before this court, on the application for the *mandamus*, the fault in the pleadings now charged was not noticed by the court in the opinion delivered, and does not appear to have been brought to their attention by the counsel for the tenant. 7 Pet., 634. The demandant might, therefore, reasonably have supposed that the court deemed the averment sufficient; because certainly the *mandamus* would not have been issued, commanding the district court to reinstate the case, and proceed to try it, unless this court had been of opinion that a sufficient cause was presented by the pleadings to give jurisdiction to the district court.

The principle on which this averment has been required is purely technical. But the rule has been established by the decisions of this court, and we do not mean to disturb it; and the proper place for the averment is undoubtedly in the declaration of the plaintiff in the cause. The district court was not bound to receive it in the joinder in demurrer; and clearly ought not to have received it, if it had been objected to by the tenant. But he has waived the objection, by failing to make it in an earlier stage of the cause, and after the proceedings which have taken place in the district court, and in this court; and when the cause has been so long continued and allowed to proceed in the same condition of the pleadings and averments, it would be unjust to the demandant to dismiss it upon this mere technical informality. The pleadings, in fact, contain all the averments required by the decisions of this court to give jurisdiction to the courts of the United States; and as they appear to have been acquiesced in by the tenant and regarded as sufficient in the district court, and were not objected to in this court, when the case was here on the application for a *mandamus*, we do not think the informality can be relied on now to dismiss the suit. The motion is therefore overruled.

BALDWIN, J., dissented.

VORE v. FOWLER.

(Circuit Court for Ohio: 2 Bond, 294-296. 1869.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is an action on a promissory note for \$1,000, given by the defendant, payable to the order of the plaintiff. The declaration is in the usual form, averring as a ground for the jurisdiction of this court that the plaintiff is a citizen of the state of Iowa and the defendant a citizen of the state of Ohio. The defendant has demurred to the declaration, one ground of which is, that the court has not jurisdiction, there being no averment that the defendant is a resident or inhabitant of the southern district of Ohio.

§ 1094. *A return of service by a marshal implies that the service was made in his own district.*

This averment is not necessary. The marshal of this district has made a return to the writ that it was served personally by the delivery of a copy to the defendant. The return does not state that it was served within the southern district of Ohio, nor was this necessary. The fact of service on the defendant implies that it was served in that district. By law, no authority is vested in the marshal to serve such process without the district for which he is appointed. The court must presume, in the absence of proof to the contrary, that the marshal has acted within the scope of his authority, and that the writ was executed within this district.

§ 1095. *An averment that defendant is a citizen of the state where suit is brought is sufficient, without averment of the district whereof he is a resident.*

The averment of the declaration that the defendant was a citizen of the state of Ohio is sufficient to give this court jurisdiction, without alleging that he was a resident or citizen of the southern district. The constitution declares that the judicial power of the United States shall extend "to controversies between citizens of different states;" and the act of congress defining the jurisdiction of the circuit courts provides that it shall extend to all suits between a citizen of the *state* in which suit is brought and a citizen of another state. It requires only that the parties shall be citizens of different states to vest jurisdiction in a circuit court of the United States without reference to the division of a state into districts. It results, therefore, that if a party sued is a citizen of the state in which suit is brought, though not a citizen or resident of the judicial district in which he is sued, the court has jurisdiction. If a citizen of the state, and the process has been served in the proper district, the question of jurisdiction cannot prevail. To this effect is the decision of the supreme court of the United States in the case of *McMicken v. Webb*, 11 Pet., 25 (§§ 1196–98, *infra*). In that case the defendant was a resident and citizen of the western district of Louisiana, but sued and served with process in the eastern district. There was a plea to the jurisdiction of the court, which the supreme court held could not be sustained. In that case as in this, the averment was that the defendant was a citizen of the state; and the writ being served in the district in which suit was brought, the jurisdiction of the court was undeniable. The demurrer is overruled.

BRADLEY v. RHINES.

(8 Wallace, 393–397. 1869.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

STATEMENT OF FACTS.—Bradley, of Kentucky, sued Rhines, administrator, of Pennsylvania, declaring upon a lease made by Breeden & Co., also of Pennsylvania, who had assigned the lease to plaintiff. The court refused to admit the lease in evidence, and there was judgment for defendant.

Opinion by MR. JUSTICE MILLER.

The first proposition made by the counsel for the defendant in error, and by which the ruling of the court is maintained, depends for its soundness on the construction to be given to certain statutes of Pennsylvania, and will not be examined by us if the ruling of the court is well founded as to the second proposition. There can be no doubt that the lease sued on here is a chose in action, and the assignors are described in the instrument as residing in the same state with defendants.

§ 1096. *Semble, that if one buys leased land from the lessor, he may sue the lessee without assignment of the lease, thus escaping the restriction.*

Two propositions are relied on as taking this case out of the prohibition of the statute: 1. That the plaintiff having purchased the lands which were the subject of the lease, became entitled thereby to the benefit of the lease, and the assignment was not necessary to enable him to maintain the action. If he had shown, or offered to show, that he had become the owner of the land, the court would probably have permitted him to do so. But as he only offered the lease and the assignment, the court could not admit them on the ground of a purchase of which there was no evidence.

§ 1097. *To make out a prima facie case in a suit against the lessee upon an assigned lease, the citizenship of the assignor must be shown at the time of suit brought.*

2. Then it is argued that although Breeden & Co. might have been, as the lease shows, citizens of Pennsylvania when the lease was made, this may not have been so when suit was brought; and that, as the plaintiff was a citizen of Kentucky, and the defendants of Pennsylvania, this makes a *prima facie* case of jurisdiction in the court, which can only be defeated by evidence that the assignors were citizens of the same state with defendants when the suit was brought.

This court has decided the proposition otherwise. In *Turner v. Bank of North America*, 4 Dall., 8 (§ 1098, *infra*), the plaintiff recovered judgment in the circuit court as assignee of Biddle & Co. The only error assigned was that it did not appear in the record that Biddle & Co. were citizens of a state other than North Carolina, in which district the defendant resided, and where he was sued; and for this cause the judgment was reversed. The soundness of this decision is recognized in the cases of *Mollan v. Torrance*, 9 Wheat., 537, and *Bank of United States v. Moss*, 6 How., 31 (§§ 53–59, *supra*), and we take the doctrine to be settled, that when a party claims in the federal courts through an assignment of a chose in action, he must show affirmatively that the action might have been sustained by the assignor if no assignment had been made. The case of *De Sobry v. Nicholson*, 3 Wall., 420, relied on by plaintiff's counsel, is not in point. There plaintiff had become possessed of all his partner's interest in the contract sued on without assignment, and none was relied on. The partner not being a necessary party, his citizenship in the same state with defendant did not defeat the jurisdiction.

Judgment affirmed.

TURNER v. BANK OF NORTH AMERICA.

(4 Dallas, 8–11. 1799.)

ERROR to U. S. Circuit Court, District of North Carolina.

Opinion by ELLSWORTH, C. J.

STATEMENT OF FACTS.—The action below was brought by the president and directors of the Bank of North America, who are well described to be citizens of Pennsylvania, against Turner and others, who are well described to be citizens of North Carolina, upon a promissory note, made by the defendant, payable to Biddle & Co., and which, by assignment, became the property of the plaintiffs. Biddle & Co. are no otherwise described than as “using trade and merchandise in partnership together,” at Philadelphia or North Carolina. And judgment was for the plaintiff. The error assigned, the only one insisted on,

is that it does not appear from the record that Biddle & Co., the promisees, or any of them, are citizens of a state other than that of North Carolina, or aliens.

§ 1098. *In a suit on a note by an indorsee, the citizenship of the payee is a jurisdictional fact, which must appear on the record.*

A circuit court, though an inferior court, in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules which the caution or jealousy of the courts at Westminster long applied to courts of that denomination; but are entitled to as liberal intendments or presumptions in favor of their regularity as those of any supreme court. A circuit court, however, is of limited jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears. This renders it necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record of a circuit court the facts or circumstances which give jurisdiction, either expressly, or in such manner as to render them certain by legal intendment. Among those circumstances it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if, as in the present case, the suit be upon a promissory note, by an assignee, to show that the original promisee is so; for by a special provision of the statute, it is his description, as well as that of the assignee, which effectuates jurisdiction.

But here the description given of the promisee only is, that "he used trade" at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that he was a citizen of a state other than that of North Carolina, or an alien; nor anything which, by legal intendment, can amount to such averment. We must, therefore, say that there is error. It is exceedingly to be regretted, that exceptions which might be taken in abatement, and often cured in a moment, should be reserved to the last stage of a suit, to destroy its fruits.

Judgment reversed.

BARGH v. PAGE.

(Circuit Court for Michigan: 4 McLean, 10-12. 1845.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is a motion to set aside the verdict obtained by the plaintiffs, for the reasons assigned. The second ground of the motion is, that there is no averment of citizenship of Timothy Page, one of the parties to the note, but who was not served with process. By the plaintiff, it is contended that the non-joinder of a joint contractor can only be pleaded in abatement. *Cabell v. Vaughan*, 1 Saund., 290, 291, 6 N., 4; *Tice v. Shute*, Burr., 2611; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 46 (BANKS, §§ 6-19); *Gilman v. Rives*, 10 Pet., 298.

§ 1099. *The citizenship of a joint promisor not served with process must appear in the declaration.*

This was undoubtedly the rule at the common law, but the limited jurisdiction of this court will not admit of the same rule. The circuit court can take

jurisdiction from the citizenship of the parties, only, when they reside in different states. By the act of 1839, if process shall not be served on all the defendants, the plaintiff may proceed to judgment against those who are before the court, provided it can be done without prejudice to those who have had no notice. But if the absent defendants live in the same state with the plaintiff, the court cannot take jurisdiction, as between them and the plaintiff, as the suit would not be, as to them, between citizens of different states. But with this exception, the court may give judgment, though a part of the persons named as defendants have not been served with process. Against those who are served, the judgment will be good.

In the special counts there was an averment of non-residence as to T. Page, on whom process was not served, but those counts were discontinued, and in the general counts there was no such reference to his citizenship as to make the averment, in this respect, in the special counts, a part of the general. As this must appear on the face of the declaration, there was no necessity to plead an abatement, to take advantage of it, as at common law. Upon the whole, we think the verdict must be set aside on the point reserved, and leave given to the plaintiffs to amend their declaration.

§ 1100. **Averment of jurisdiction necessary.**—The federal courts being courts of special jurisdiction, and there being no presumption in favor of their jurisdiction where the facts requisite to show it do not appear on the record, express allegation of the facts necessary to give jurisdiction is necessary. *Hornthall v. The Collector*,* 9 Wall., 560.

§ 1101. A federal court cannot take cognizance of a bill in equity unless the citizenship is such as to give it jurisdiction, and this citizenship must appear on the record. *Mossman v. Higginson*,*4 Dal., 14.

§ 1102. The citizenship of the parties must appear on the record. Residence is not sufficient. *Wood v. Wagnon*,* 2 Cr., 9; *Capron v. Van Noorden*,* 2 Cr., 126; *Turner v. Enille*, 4 Dal., 7; *Anderson v. Jackson*,* 2 Paine, 426; *Shedden v. Curtis*,* 6 Call (Va.), 241.

§ 1103. When a party is made defendant who is a proper defendant, and who has been served with process and has answered, but whose citizenship is not made to appear on the record, the bill must be dismissed without prejudice for want of jurisdiction. *Gaylords v. Kelshaw*,* 1 Wall., 81.

§ 1104. The United States circuit court is a court of limited jurisdiction, and to entitle it to take jurisdiction of a case it must appear on the record that the plaintiff is either an alien or a citizen of another state from the defendant. If the suit is on a promissory note by an assignee, the citizenship of the original promisee must be different from that of the defendant. *Turner v. Bank of North America*, 4 Dal., 8 (§ 1098).

§ 1105. If a bill in equity in a federal court names the citizenship of the complainants but not of the defendants, the court cannot take jurisdiction. *Findlay v. Bank of United States*, 2 McL., 47 (BILLS AND NOTES, §§ 596-602).

§ 1106. Where the plaintiff omitted to allege in his declaration that he was a citizen of another state, the court on motion of the defendant arrested judgment after verdict. *Shedden v. Curtis*,* 6 Call (Va.), 241.

§ 1107. For the purposes of jurisdiction, the citizenship of a corporation should be averred in the pleadings. *Greeley v. Smith*,* 3 Story, 78.

§ 1108. When the jurisdiction of the circuit court of the United States depends upon the citizenship of the parties, if the citizenship is not so alleged that the jurisdiction appears on the record, the supreme court will, when the case is before it on a writ of error, strike the case from the docket. *Bingham v. Cabot*, 3 Dal., 382.

§ 1109. When an action of ejectment is brought by a municipal corporation against several defendants, and the cause is removed to a federal court upon a petition which does not allege that all the defendants are citizens of a different state from the plaintiff, the cause must be remanded. *Ex parte Girard*, 3 Wall. Jr., 265.

§ 1110. In order to give to this court jurisdiction on the ground of parties, it must be a suit between a citizen of the state within its district, and a citizen of another state. And the necessary averments of citizenship to confer jurisdiction must appear on the face of the bill. *Merserole v. Union Paper Collar Co.*, 6 Blatch., 356.

§ 1111. When not necessary to aver citizenship.—A statute of Alabama converts a joint note into a joint and several note. Hence when a holder brings suit in the circuit court for that district against two joint makers, averring their citizenship in the writ, and discontinues against one of them who was not found within the district, it is not necessary for him in his declaration to aver the citizenship of such one. *Smith v. Clapp*,* 15 Pet., 125.

§ 1112. An assignee of a note payable to bearer, by delivery, is not within the eleventh section of the judiciary act, and hence it is not necessary to aver the citizenship of the payee. *Ibid.*

§ 1113. Citizenship must appear in the process.—In order to sustain the jurisdiction of the federal court it must be set forth in the process that the parties are citizens of different states. Otherwise the case will be struck off the docket. *Emory v. Greenough*, 3 Dal., 369. See § 1065.

§ 1114. *It seems* that the allegations of citizenship which are necessary to confer jurisdiction on the courts of the United States should appear in the writ. *Lyell v. Goodwin*, 4 McL., 43.

§ 1115. Presumptions.—Where a cause is removed from a state court to the circuit court of the United States, in accordance with the statutes in such case provided, and the records are then destroyed by fire, and these facts appear by a stipulation filed by the parties, who ask to be allowed to supply the lost pleadings, and this is done and judgment rendered by the circuit court, the supreme court upon error will presume from the allegations of the stipulation that the lost record contained the proper allegations of citizenship. *Railway Co. v. Ramsey*, 22 Wall., 326.

§ 1116. When proper allegations of the citizenship of parties are made to give the federal courts jurisdiction of the cause, *it seems* that such allegations are presumed to be true, and one who relies upon their being untrue must allege and prove that fact. *Sheppard v. Graves*, 14 How., 510.

§ 1117. Amendment.—The omission to state the citizenship of the plaintiff or defendant in a bill in equity in a federal court is a formal omission and may be cured by amendment. *Vose v. Philbrook*, 3 Story, 344.

§ 1118. When a case has been dismissed from the United States circuit court for lack of proper allegations of citizenship in the parties, and an appeal to the supreme court dismissed, that court will not allow the record to be amended by inserting such allegations, but those amendments may be made in the circuit court. *Jackson v. Ashton*, 10 Pet., 480.

§ 1119. Sufficiency.—An averment of citizenship is sufficient if it fairly appear of what states the parties are citizens. *Jones v. Andrews*, 10 Wall., 327 (§§ 883-886).

§ 1120. A special count by indorsee against maker should show that maker and payee were citizens of different states, but a money count stating indebtedness, and a promise to pay from defendant to plaintiff, is sufficient on the record to give jurisdiction. *Bank of U. S. v. Moss*, 6 How., 31 (§§ 53-59).

§ 1121. A bill in equity in which plaintiff describes himself as a citizen of Virginia, and makes as defendants the receiver, directors and stockholders of the insolvent Merchants' Bank of South Carolina, without further averments of citizenship, does not show a case within the jurisdiction of the circuit court. *Godfrey v. Terry*,* 7 Otto, 171.

§ 1122. An averment that plaintiff is an alien will not give jurisdiction to the circuit court, without an averment of the citizenship of defendant. *Mossman v. Higginson*,* 4 Dal., 12.

§ 1123. It is not sufficient to aver that plaintiff is an alien. It should appear that he is a citizen or subject of some one foreign state. *Wilson v. City Bank*,* 3 Sumn., 422.

§ 1124. Averments that the plaintiffs "reside without the limits of Georgia," and that defendant is of the "district of Georgia," are insufficient to give the circuit court jurisdiction. *Abercrombie v. Dupuis*,* 1 Cr., 343.

§ 1125. Averments that the plaintiffs are aliens, and that the defendants are "late of the district of Maryland, merchants," are insufficient to support jurisdiction in the circuit court. *Hodgson v. Bowerbank*,* 5 Cr., 303.

§ 1126. If the averment of citizenship of plaintiff in a case in the federal circuit court be that "said X. was, during his life-time, a citizen of the United States, and of the state of Pennsylvania," and the suit is against citizens of California, this averment sufficiently implies that the plaintiff was not a citizen of California. *Bayerque v. Haley*, McAl., 97.

§ 1127. The record described the plaintiffs as aliens, and subjects of the king of the United Kingdom of Great Britain and Ireland, and the defendants as late of the district of Maryland, merchants, but were not stated to be citizens of Maryland. *Held*, fatally defective. *Hodgson v. Bowerbank*,* 5 Cr., 303.

§ 1128. The description of a party as a citizen of the United States, and an inhabitant of Connecticut, is equivalent to describing him as a citizen of Connecticut. *Duryee v. Webb*,* 16 Conn., 558.

§ 1129. Where the bill described the plaintiffs as citizens of Massachusetts, Connecticut and Vermont, and the defendants as a corporate body, incorporated by the legislature of the state of New York, the bill was dismissed, because it appeared that the parties were not described as citizens of different states. *Sullivan v. Fulton Steamboat Co.*, 6 Wheat., 450.

§ 1130. The averment that plaintiffs are a firm of natural persons, associated together for the purpose of carrying on the banking business at a certain place, and have been for a period of eighteen months engaged in that business at that place, is a sufficient averment that they are citizens of the state in which that place is situated. *Express Co. v. Kountze*, 8 Wall., 351 (CARRIERS, §§ 1499-1502).

§ 1131. An allegation that a party is "of a certain state" is a sufficient allegation, after verdict, that he is a citizen of that state. *Edwards v. Nichols*,* 3 Day (Conn.), 25.

§ 1132. If the declaration in a suit on a promissory note in a federal court by an assignee begins by stating that the maker and payee are both citizens of the same state, but the declaration afterwards avers that the payee was an alien, and resident of a different state at the time of making and also of transferring the note, the jurisdiction is sustained. *Bailey v. Dozier*, 6 How., 28 (BILLS AND NOTES, §§ 942-46).

§ 1133. If, in a suit in a federal court, proper averments of citizenship are made in the first count, and referred to in the second count, the second count is good on demurrer. *Jones v. Heaton*, 1 McL., 317.

§ 1134. An allegation in the pleadings that a party to a suit in a federal court is a citizen of a state, giving the name, is a sufficient allegation that he is a citizen of the United States. *Wright v. Hollingsworth*, 1 Pet., 168.

§ 1135. When, in a suit in the United States circuit court, citizenship is necessary to give jurisdiction, and the defendant is a corporation, it must be alleged that it is incorporated by the laws of a state and not that it is a citizen of a state, for a corporation cannot be a citizen, but all its stockholders are, for purposes of jurisdiction, conclusively presumed to be citizens of the state where it is incorporated. The averment need not be formal if its substance can be gathered from the pleadings. If not, the defect is fatal at any state of the case. *Muller v. Dows*, 4 Otto, 445 (CORP., §§ 1574-79).

§ 1136. An allegation in a complaint that the plaintiff is a citizen of one state and the defendant, an insurance company, is a citizen of another state, is not sufficient to give jurisdiction, as it does not aver by what state the company was chartered, if at all, and a corporation cannot be a citizen of any state. But if the plaintiff's replication avers that the defendants are a corporation created under the laws of a state of which the plaintiff is not a citizen, and the defendant demurs, this is sufficient to give jurisdiction. *Lafayette Ins. Co. v. French*, 18 How., 405 (CORP., §§ 1140-45).

§ 1137. **Repugnancy.**—An averment that the plaintiffs were citizens of New York, to wit, at Springfield in the state of Illinois, is repugnant, and cannot be used where citizenship is a ground of jurisdiction. *Leavitt v. Cowles*,* 2 McL., 491.

§ 1138. **Objection to, how made.**—If plaintiff in a suit in the circuit court of the United States does not make the necessary averment of citizenship, it must be taken advantage of by plea or demurrer. An allegation of residence is not enough. *Hilliard v. Brevoort*, 4 McL., 25; *Evans v. Davenport*, id., 575.

§ 1139. If proper allegations of citizenship to give the federal courts jurisdiction appear on the record, the defendant can only impugn it by a special plea to the jurisdiction. *Wickliffe v. Owings*, 17 How., 51.

§ 1140. Although if the record does not contain allegations showing the citizenship of parties necessary to give the federal court jurisdiction, the court will, at any time, notice this defect and dismiss the case, yet if there are proper allegations, but the defendant wishes to deny the truth of them, he must do it by plea in abatement, and cannot introduce such denial into a general answer. *Wood v. Mann*, 1 Sumn., 580.

§ 1141. **Plea to jurisdiction must be denied.**—When a plaintiff relies on the citizenship of the parties to give the circuit court jurisdiction, he must distinctly allege that he is a citizen of one state, and the defendant a citizen of another. If he does this, the allegation is taken to be true if not denied by a plea in abatement. If denied, and the plaintiff demurs to the plea, the court has no jurisdiction. *Scott v. Sandford*, 19 How., 401.

§ 1142. **Sufficiency of plea.**—A suit was brought by an indorsee of a note against a remote indorser on a count for money had and received. Defendant filed a plea to the jurisdiction, stating that he and plaintiff's immediate indorser were citizens of the same state. *Held*, that this plea was insufficient, as the averment should be that they were citizens of the same state at the time when the action was brought. *Mollan v. Torrance*,* 9 Wheat., 537.

§ 1143. **As to the district of defendant's residence.**—When sufficient allegations of the citizenship of parties are made, to give the federal court jurisdiction, no allegation is neces-

sary that the defendant resides in the district in which suit is brought. If he is sued out of his district, he can plead his personal privilege. *Teese v. Phelps, McAl.*, 17.

§ 1144. **Removal.**—When a suit is begun in the circuit court of the United States to foreclose a mortgage, that court having jurisdiction of the subject-matter and the parties, and afterwards a suit is begun in a state court affecting the same subject-matter, the circuit court may take jurisdiction of the second suit, when removed to it by consent of parties, although no allegations appear in the record stating a proper case of citizenship in the parties. *People's Bank v. Calhoun*, 12 Otto, 261.

§ 1145. In a provisional court established in Louisiana at the close of the rebellion a suit was begun, in which the allegations disclosed a cause not cognizable in the circuit court. Plaintiff subsequently moved in the circuit court that the case be transferred into that court, suggesting that defendant was an alien. *Held*, that as the record showed that the court was without jurisdiction at first, this suggestion could not aid the matter and the motion was dismissed. *Edwards v. Tanneret*,* 12 Wall., 446.

b. Assignees and Indorsees.

SUMMARY—*Citizenship of original assignor only material*, § 1146.—*Citizenship of intermediate assignees immaterial*, § 1147.—*Extent of the restriction*, § 1148.—*No application to removed suits*, § 1149.—*Restriction applies only to contents of choses*, §§ 1150-51.—*Specific performance*, § 1152.—*Assignee of insolvent*, § 1153.—*Suit for an account of sales*, § 1154.—*All the assignors must have been competent*, § 1155.—*Mortgage*, § 1156.—*Nominal assignee*, § 1157.—*Time when assignor must be competent*, §§ 1158-59.—*United States as assignee*, § 1160.—*Note payable to bearer*, § 1161.—*Indorsee and indorser*, § 1162.—*Non-negotiable paper*, § 1163.—*Act of 1875; negotiable by law merchant*, § 1164; *municipal bonds*, § 1165; *non-negotiable by statute*, § 1166; *mortgage*, § 1167; *taxes*, § 1168; *note under seal*, § 1169.—*Duty to dismiss collusive suits*, § 1170.—*Instances of suits in collusion and colorable transfers*, §§ 1171-78.

§ 1146. In a suit in the federal court by the assignee of a chose in action against the original promisor, the citizenship of plaintiff's immediate assignor is not material, but only that of the original promisee, as the statute takes away jurisdiction in suits by assignees only in those cases where there would be no jurisdiction if no assignment had been made. *Milledollar v. Bell*, § 1179.

§ 1147. The circuit court has jurisdiction of a suit by a non-resident assignee, provided that the original holder of the chose in action was competent to sue, and it is immaterial that there was an intermediate assignment to a party who was not competent. *Wilson v. Fisher*, § 1180.

§ 1148. *Semble*, that the restriction in the eleventh section of the judiciary act applies only to suits founded on contracts which contain some promise or duty to be performed. *Bushnell v. Kennedy*, §§ 1181-82.

§ 1149. The restriction in the eleventh section not being found in the twelfth section, which provides for the removal of suits from the state courts, and the reason for it not existing in regard to cases removed, it is not to be considered as applying to them. *Ibid.*

§ 1150. An assignee may maintain an action of replevin in the circuit court to recover certain bank-bills, although his assignor be incompetent, and the assignment was after the detention of the bills by defendant. *Deshler v. Dodge*, §§ 1183-85.

§ 1151. The restriction in section 11 of the judiciary act prohibits an action to recover the contents of a note, but not an action to recover the note itself. *Ibid.*

§ 1152. A suit to compel the specific performance of a contract, upon the payment by plaintiff of a sum of money, which is tendered, is a suit to recover the contents of a chose in action, within the restriction in section 11 of the judiciary act of 1789. *Corbin v. County of Black Hawk*, §§ 1186-87.

§ 1153. The general assignee of an insolvent cannot sue in a federal court, unless his assignor could have sued. *Serè v. Pitot*, §§ 1188-89.

§ 1154. A right to an account of sales of property is a chose in action, and the assignee is within the restriction in section 11 of the judiciary act of 1789. *Wilkinson v. Wilkinson*, §§ 1190-93.

§ 1155. An assignee of a chose in action from two trustees may sue only when both his assignors could have sued. *Ibid.*

§ 1156. A bond secured by mortgage is a chose in action within the eleventh section of the judiciary act, and the assignee thereof cannot sue if his assignor be incompetent so to do. *Sheldon v. Sill*, §§ 1194-95.

§ 1157. When a note declared on was made payable to the plaintiff and a third person, but for the sole benefit of plaintiff, the latter is not to be considered an assignee of the note within the meaning of section 11 of the judiciary act. *M'Micken v. Webb*, §§ 1196-98.

§ 1158. The jurisdiction of the circuit court in a suit by a non-resident assignee of a note depends upon the citizenship of the assignor at the time of suit brought, and the fact that the latter could not have sued at the time of the assignment is immaterial. *Chamberlain v. Eckert*, §§ 1199, 1200.

§ 1159. The fact that at one time the federal court might have had jurisdiction of a suit in favor of an assignee of a certain chose in action, by reason of the citizenship of the parties, does not give jurisdiction if, before suit is brought, the assignor becomes a citizen of the same state with the original promisor. *Thaxter v. Hatch*, § 1201.

§ 1160. Whether or not the United States could maintain suits where its assignor could not, under the judiciary act of 1789, is uncertain, but if it was within the restriction, this has been repealed by the act of March 3, 1815. *United States v. Greene*, §§ 1202, 1203.

§ 1161. A note payable to one or bearer may be sued upon by the holder in the circuit court, irrespective of the citizenship of his assignor. *Sackett v. Davis*, § 1204.

§ 1162. An indorsee of a note may sue his immediate indorser in the circuit court, irrespective of the citizenship of the maker. *Campbell v. Jordan*, §§ 1205, 1206.

§ 1163. The assignor of a chose in action which is not negotiable is deemed the real plaintiff in an action brought in his name, and if he be competent to sue, the federal court has jurisdiction. *Irvine v. Lowry*, §§ 1207-1209.

§ 1164. The act of March 3, 1875, confers jurisdiction on the federal courts in suits in favor of an assignee, not of negotiable paper generally, but of paper negotiable by the law merchant. A county warrant is not so negotiable. *Beverly v. Davidson County*, § 1210.

§ 1165. Municipal bonds are promissory notes within the meaning of the act of March 3, 1875, when simply an acknowledgment of indebtedness and promise to pay, and an assignee may bring suit upon one, irrespective of the citizenship of the assignor. *Porter v. Janesville*, §§ 1211-12.

§ 1166. By a statute of Indiana notes are negotiable only when payable at a bank in that state. An Indiana note not so payable is not "negotiable by the law merchant" within the meaning of the act of March 3, 1875, and an assignee cannot sue unless his assignor would have been able to sue. *Gregg v. Weston*, § 1213.

§ 1167. Under the act of March 3, 1875, a circuit court has jurisdiction to foreclose a mortgage given to secure a negotiable note, at suit of a non-resident assignee of the mortgage, without regard to the citizenship of the assignor. *Seckel v. Backhaus*, § 1214.

§ 1168. The act of March 3, 1875, does not give the right to an assignee to maintain an action in the circuit court to recover taxes illegally assessed against his assignor, unless the latter is competent to sue. *Stanley v. Supervisors*, § 1215.

§ 1169. A promissory note made by a corporation and sealed with its seal is not a promissory note negotiable by the law merchant, within the act of March 3, 1875, and the circuit court has no jurisdiction of a suit thereon in favor of an assignee, unless the assignor could have sued. *Coe v. Railroad Co.*, § 1216.

§ 1170. Under the act of March 3, 1875, it is the duty of the circuit court to dismiss an action whenever it appears that the parties are collusively joined for the purpose of making a case cognizable under that act. *Williams v. Nottawa*, §§ 1217-18.

§ 1171. The fact that the plaintiff bought the land which is the subject of the suit, with the intention of bringing suit upon it in a federal court, which his grantor was incompetent to do, does not defeat the jurisdiction of such court, provided the transaction was real. *McDonald v. Smalley*, §§ 1219-20.

§ 1172. An actual transfer of interest in a controversy to a citizen of another state, for the purpose of giving jurisdiction to the circuit court, may give such jurisdiction, but a merely colorable transfer will not. *Barney v. Baltimore*, §§ 1221-25.

§ 1173. Where land was deeded to a relative in another state, but without any payment of money, and suit was immediately begun in the name of the grantee in the circuit court, this was held to be a merely collusive and colorable transaction, and the court was without jurisdiction. *Hayden v. Manning*, § 1226.

§ 1174. Where a bank, the holder of a note, transferred the note to a citizen of another state as collateral security for a loan, but without his knowledge, and solely for the purpose of bringing suit in the circuit court, virtually making him an agent for collection of the note, held, that such transfer was merely colorable and did not vest title in the transferee nor give jurisdiction to the court. *Welles v. Newbury*, § 1227.

§ 1175. Where land was conveyed to a citizen of another state, the expressed consideration being adequate, but no money actually changing hands, there being a condition that the land should be reconveyed at the end of five years in default of payment, and a stipulation that

the condition should not operate as a mortgage, and suit was immediately begun in the circuit court in reference to the land by the grantee, *held*, that the transaction was merely colorable and the court had no jurisdiction. *Starling v. Hawks*, § 1228.

§ 1176. Where a note is transferred to a citizen of another state in order to give jurisdiction to the federal court, and the assignee takes in good faith and without knowledge of the object, the court will have jurisdiction. *Marion v. Ellis*, § 1229.

§ 1177. Where parties conveyed land to a stranger, a citizen of another state, without his knowledge and without consideration, and subsequently, authorized by him, began suit in the circuit court with reference to the land, for their own benefit, in the expectation of a reconveyance, though without any promise to that effect, *held*, that this was, within the act of March 3, 1875, a collusive and colorable transaction to give jurisdiction to the court, and the suit must be dismissed. *Coffin v. Haggin*, § 1230.

§ 1178. Neither under the judiciary act of 1789, nor under the act of March 3, 1875, has any case held that a formal transfer of property, without consideration, for the purpose of giving jurisdiction to the federal court, could give such jurisdiction, nor can such doctrine be supported. *Greenwalt v. Tucker*, §§ 1231-32.

[NOTES.—See §§ 1233-1305.]

MILLEDOLLAR *v.* BELL.

(Circuit Court for New Jersey: 2 Wallace, Jr., 334-338. 1852.)

STATEMENT OF FACTS.—This was a bill in equity to enforce a mortgage given to secure the payment of a promissory note. The bill set out seven intermediate assignments, but failed to state the citizenship of any of the successive holders of the note, except the original mortgagee and the last, the plaintiff, who it was averred were both citizens of New York. There was a demurrer to the bill, on the ground that it did not show that each of the successive holders of the paper could have proceeded on it in a federal court.

Opinion by GRIER, J.

The bill avers that Milledollar, the mortgagee, is a citizen of New York. He could, therefore, have brought his suit in this court for the contents of the bond and mortgage, "*if no assignment had been made.*" And to sustain the jurisdiction of the court in his case, it would have been necessary only to aver that the mortgagors were citizens of New Jersey at the time suit was brought.

§ 1179. *In case of an assignment a circuit court of the United States has jurisdiction, if the holder of the paper and the original payee are citizens of states different from that of the debtor. The citizenship of intermediate assignees is immaterial.*

The complainant's case is therefore within the strict letter of the law — nor can we discover anything in the spirit, equity or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, *unless his immediate assignor could have sustained such action*; but only in case the court could have had no jurisdiction as between the original parties to the instrument, *if no assignment had been made*. The situation or rights of temporary intermediate assignees, holders or indorsers enter not into the conditions of the case.

The only case which has been brought to our knowledge, in which this point is directly decided, is that of *Wilson v. Fisher*, Bald., 133 (§ 1180, *infra*), which fully supports our view of this point. *Mollan v. Torrance*, 9 Wheat., 537, in the supreme court of the United States, which has been quoted as upholding a contrary doctrine, will be found on examination to have no application. It affirms the doctrine of *Young v. Bryan*, 6 Wheat., 146, that an indorsee who

resides in a different state may sue his immediate indorser residing in the state where suit is brought, although the indorsee may be a citizen of the same state with the maker. The reason is, because the indorsee sues upon his own contract with the indorser, and not on the original contract of the drawer. But in the case last quoted, of *Mollan v. Torrance*, though Torrance was sued as indorser, Mollan was not the immediate indorsee, and it did not appear that Lowrie, who was the immediate indorsee and contractor with Torrance, could have sued in the circuit court. The question whether, if the immediate indorsee could have sued, and the then present holder and plaintiff could also have sued by reason of citizenship, the rights of intermediate holders could affect the case, was not before the court. The language used in the opinion of the court is perfectly correct, when applied to the case before it. No court can pronounce dogmas of universal application; and the application of general expressions, in an opinion, to cases not before the court, is a sure road to an erroneous result. The same remarks will apply to the cases decided in the first circuit, and reported in different volumes of *Woodbury & Minot* (*Brown v. Noyes*, 2 Woodb. & M., 75; *Heckscher v. Binney*, 3 id., 334), so far as the language of them can be made to apply to the present case at all. They are correct decisions of the case before the court. But the point now under consideration was not raised nor considered.

We are of opinion, therefore, that, as this bill shows that the complainant is a citizen of New York and the defendants citizens of New Jersey, at the time the bill was filed, and that the original contractor or mortgagee is a citizen of the same state, and could therefore have sued these defendants, at the time this bill was filed, in the circuit court of New Jersey, "*if no assignment had been made*," this court has jurisdiction of the case, and the citizenship of the immediate holders, owners or assignees is immaterial, and need not be averred.

Demurrer overruled, with costs.

WILSON v. FISHER.

(Circuit Court for Pennsylvania: Baldwin, 133-137. 1830.)

Opinion by HOPKINSON, J.

STATEMENT OF FACTS.—The bill, in this case, is filed by John Wilson and Israel Wilson, aliens, against Redwood Fisher and others, executors of Miers Fisher, deceased, and sets forth: "That on the 2d of July, 1787, Mary Brownjohn, Gabriel W. Ludlow and others, executors of William Brownjohn, deceased, all citizens of the state of New York, obtained a judgment in the supreme court of Pennsylvania, against Charles Hurst, a citizen of the state of Pennsylvania, for the sum of £6,175 12s. 11d., money of Pennsylvania; part of which has been levied and received by the plaintiffs out of the real estate of said Charles, and part thereof, to wit, \$1,715.83, hath been received by the defendants in this suit. That when this money was received by the defendants, the complainants were ignorant of the rights of Jonathan H. Hurst to a proportion of the said judgment. That on or about the 12th of May, 1796, the said judgment, by a decree of the chancellor of New York, was assigned by the said Gabriel W. Ludlow, the survivor of the said executors of William Brownjohn, to William Hurst, then of the city of New York, in trust for himself and for the said Jonathan H. Hurst, and others, his brothers and sisters, each being entitled to one-sixth part. Jonathan afterwards became entitled to two third parts of the said judgment, and died, leaving a will by

which he appointed Edward Hurst and Alfred Hurst his executors; who, on the 24th of April, 1829, in consideration of \$1,500, assigned to the complainants the said two-thirds of the said judgment."

To this bill the defendant has pleaded to the jurisdiction of this court, alleging that Jonathan H. Hurst was, at the time of his death, a citizen of Pennsylvania; that his said executors, at the time of the assignment made by them to the complainants, and at the time of the filing of this bill, and the institution of this suit, were citizens of Pennsylvania. To this plea the complainants have demurred, and for cause show that the judgment set forth in their bill, two-thirds of which were assigned to them as set forth in their bill, was obtained by the parties, plaintiffs therein, as executors of William Brownjohn, deceased, all citizens of the state of New York, against Charles Hurst, a citizen of Pennsylvania. The complainants in this bill are aliens; the defendants are citizens of the state of Pennsylvania; and the record therefore presents parties who have an undoubted right to sue in this court, under the provisions of the eleventh section of the judiciary act of 1789, describing the persons who may sue in the federal courts. But the question arises under a clause in the latter part of that section, by which it is declared as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or *other chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, *if no assignment* had been made."

§ 1180. *The circuit court has jurisdiction of a suit by a non-resident assignee, if the original assignor was competent, although there was an intermediate assignment to a party not competent.*

We do not find it necessary to decide in this case whether a judgment is such a chose in action as to fall within this prohibition or restriction of our jurisdiction. The question now to be disposed of may be determined on other grounds. On the one part it is insisted that as the present defendants are citizens of Pennsylvania, and both J. H. Hurst and his executors, by virtue of whose assignment the complainants have derived the right now prosecuted, were also citizens of Pennsylvania, who therefore could not have prosecuted this suit against these defendants in this court, it is a case directly within the provision of the act of congress. On the part of the complainants it is answered that although their right is derived immediately from J. H. Hurst, yet that he derived that right by an assignment from the executors, who were citizens of the state of New York, and had a clear right to prosecute their suit in this court; and the question is thus presented, whether the assignment mentioned in the act of congress has reference to that under which the plaintiff claims directly, or to that by which the right was divested out of the party originally entitled to it. The suit cannot be maintained here unless it might have been prosecuted here, *if no assignment* had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless a recovery of the right claimed might have been had in this court if no assignment of it had been made; and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here.

The question now under consideration has received, as far as we can find, no

direct adjudication; but the clause of the act of congress under which it arises has several times come under the notice of the courts. In the case of *Serè v. Pitot*, 6 Cranch, 322 (§§ 1188–89, *infra*), the question turned on a distinction set up between an assignment made by operation of law, and one by the act of the party, the plaintiff claiming by virtue of a general assignment of the effects of an insolvent. The chief justice states the objection to be “that the suit was brought by the assignees of a chose in action, in a case where it could not have been prosecuted if no assignment had been made.” The terms in which the objection is taken and stated show a disposition to keep to the words of the law, and to oust the jurisdiction only in cases falling clearly, if not literally, within them. In *Montalet v. Murray*, 4 Cranch, 46, we come still nearer to the construction we have adopted. It is there said, “if it did not appear upon the record that the character of the *original parties* would support the prosecution, the objection is fatal.” The court here seem to refer the question of jurisdiction to the character of the original parties to the contract or chose in action, for the recovery of which the suit is prosecuted, without regarding any subsequent or intermediate holder, provided that the plaintiff himself is qualified to sue. The provisions of the act of congress are met if we have good parties on the record, and the right claimed to be recovered might have been prosecuted here if no assignment of it had been made. The parties to the contract or chose in action, and the parties to the suit, are looked to by the act of congress, and we may suggest many doubts and difficulties that would arise if the character of the various persons through whose hands the chose in action might have passed are to be inquired into. So far as we may speculate upon the intention and policy of the legislature in making this enactment, they will be fully answered by this construction.

We are of opinion that the jurisdiction of this court is well maintained in this case, and that judgment on the demurrer be entered for the complainant.

BUSHNELL v. KENNEDY.

(9 Wallace, 387–394. 1869.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Mills & Frisby, citizens of Louisiana, owed a sum of money to Kennedy & Co., also of Louisiana. Bushnell, of Connecticut, owed the same amount to Mills & Frisby. The latter assigned their claim to Kennedy & Co., who sued Bushnell in a state court of Louisiana. The defendant removed the case to the circuit court, which subsequently remanded it to the state court. This order is appealed from.

Opinion by CHASE, C. J.

That the indebtedness of Bushnell to Mills & Frisby was a *chose in action* cannot be doubted, for under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract. Nor can it be denied that every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the national constitution and laws, gives to the court jurisdiction of his suit. *Turner v. Bank of North America*, 4 Dal., 8 (§ 1098, *supra*).

In the case before us the suit was brought in the state court, where no question of jurisdiction, founded upon citizenship, could arise. In that court, therefore, there was no necessity for any averment in respect to citizenship. But under the twelfth section of the judiciary act any defendant, being a cit-

izen of another state than the plaintiff or petitioner, is entitled, upon application at the proper time, to have his cause removed to a circuit court of the United States; and in the case under consideration the defendant filed his petition averring the requisite facts as to his own citizenship and the citizenship of the petitioners, and thereupon obtained an order for removal. The order was, doubtless, rightly made. The jurisdiction of the cause was regularly transferred to the circuit court, and the cause stood in that court as if brought there by original process. The jurisdiction thus acquired by the circuit court was in no sense appellate. Removal, under our peculiar system of state and national jurisdictions, is simply a mode in which the right to resort under certain circumstances to the latter rather than the former is secured to defendants as well as plaintiffs.

Two questions, then, arise in this cause: (1st) Whether the eleventh section of the judiciary act applies to a suit instituted by the assignees of such a *chose in action* as is shown in the pleadings? and (2d) Whether valid objection can be taken to jurisdiction of such a suit when removed to the circuit court by the defendant under the twelfth section?

§ 1181. *The construction of the restriction in the eleventh section of the judiciary act not to be taken too literally.*

Upon the first question it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee; though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. *Bullard v. Bell*, 1 Mason, 259; *Bank of Kentucky v. Wister*, 2 Pet., 321 (BANKS, §§ 265–69). So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. *Chappedelaine v. Dechenaux*, 4 Cranch, 308 (ACCOUNTS, § 21). And it has also been determined that the assignee of a *chose in action* may maintain a suit in the circuit court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. *Deshler v. Dodge*, 16 How., 631 (§§ 1183–85, *infra*). And it has recently (*Barney v. Globe Bank*, 2 Am. L. Reg. (N. S.), 229) been very strongly argued that the restriction applies only to contracts “which may be properly said to have contents;” “not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed.”

And this view of the restriction seems to be warranted by the consideration of the mischief which it was intended to prevent. Not a little apprehension was excited at the time of the adoption of the constitution in respect to the extent of the jurisdiction vested in the national courts; and that apprehension was respected in the judiciary act, which soon afterwards received the sanction of congress. It was obvious that numerous suits, by assignees, under assignments made for the express purpose of giving jurisdiction, would be brought in those courts if the right of assignees to sue was left unrestricted. It was to prevent that evil and to keep the jurisdiction of the national courts within just limits that the restriction was put into the act.

This view has the sanction of Chief Justice Marshall, who, in the case of *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat., 904 (§§ 692,

693, *supra*), used this language: "It was apprehended that bonds and notes given in the usual course of business, by citizens of the same state to each other, might be assigned to the citizens of another state, and thus render the maker liable to a suit in a federal court." And when it is remembered what class of actions it is, which, upon the principles of the common law, can be maintained by an assignee in his own name, it may well be admitted that it would not have been an unreasonable construction of the restriction if it had been applied only to notes, bonds, and other written contracts, containing promises to pay money, upon which an assignee could sue without using the name of the assignor. Of such contracts, certainly, it may with more propriety be said that they have "contents" than of claims for damages arising either from torts or from breaches of contracts.

§ 1182. *Suits removed under the twelfth section are not within the restriction in the eleventh section.*

It is true that at an earlier day a different construction was given to it. In *Serè v. Pitot*, 6 Cranch, 332 (§§ 1188-89, *infra*), it was held that an assignee, by act of the law, as the general assignee of the effects of an insolvent, could not sue in the circuit court unless the insolvent himself might sue. It is not easy to reconcile this opinion with the later judgments, but it is not necessary now to determine definitely the true construction of the restriction, as we think that the jurisdiction of the circuit court over the cause before us can be well supported on the twelfth section. That section, as we have already stated, provides for the removal of suits by defendants. The restriction in the eleventh section is not found in the twelfth. Nor does the reason for the restriction exist. In the eleventh section its office was to prevent frauds upon the jurisdiction, and vexation of defendants, by assignments made for the purpose of having suits brought in the name of assignees, but in reality for the benefit of assignors. In the twelfth it would have no office, for the removal of suits could not operate as a fraud on jurisdiction, and was a privilege of defendants, not a hardship upon them.

It is true, indeed, as was said in argument, that the section provides that after removal "the cause shall then proceed in the same manner as if it had been brought by original process," but we cannot recognize the validity of the inference that the defendant, before pleading in the circuit court, may move to dismiss the suit for want of jurisdiction. This construction would enable the non-resident defendant in a state court to remove the suit against him into a circuit court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the act, is wholly inadmissible. And it is clear that the language of the act does not require it. Its plain meaning is that the suit shall proceed, not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against his consent, but by his own act, and the suit is to proceed as if brought by original process, and the defendant had waived all exception to jurisdiction and pleaded to the merits. Under the eleventh section the exception to jurisdiction is the privilege of the defendant, and may be waived, for the suit is still between citizens of different states, and the jurisdiction still appears in the record. The first act of the defendant, indeed, under the twelfth section, is something more than consent, something more than a waiver of objection to jurisdiction; it is a prayer for the privilege of resorting to federal jurisdiction, and he cannot be permitted afterwards to question it. *Sayles v. Northwestern Ins. Co.*, 2 Curt., 212.

We cannot doubt, therefore, that the circuit court had jurisdiction of the case under consideration. We are all of opinion that the court erred in remanding the cause to the jurisdiction of the state court, and the order to that effect must be reversed.

DESHLER v. DODGE.

(16 Howard, 622-635. 1853.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Ohio. The suit below was an action of replevin to recover the possession of a quantity of bank-bills, in the hands of the defendant, upon banks in the city of Cleveland, amounting in the whole to the sum of \$38,592, and the title to which was derived by an assignment from the banks to the plaintiff. The declaration is in the usual form for wrongfully and unjustly detaining the possession of the property, the plaintiff averring that he is a citizen and resident of the state of New York, and the defendant a citizen and resident of the state of Ohio.

To this declaration the defendant pleaded to the jurisdiction of the court, setting up that the defendant was acting treasurer of the county of Cuyahoga, Ohio, and had distrained the bills in question belonging to the banks to satisfy the taxes and penalties duly imposed upon them; and that after the said bills had been thus distrained and in his possession, the said banks being incorporated companies by the laws of the state of Ohio, and doing business in the city of Cleveland, sold, assigned and transferred the same to the plaintiff; and that all the right and title to the said bills belonging to him is derived from the aforesaid assignment; wherefore the defendant says, the supposed causes of action are not within the jurisdiction of the court, and prays judgment if it will take further cognizance of the suit. To this plea the plaintiff demurred, and the defendant joined in demurrer, upon which judgment in the court below was given for the defendant.

§ 1183. *The inhibition of the judiciary act applies to suits for the contents of choses in action, not to those for the thing itself.*

The only question presented in the case by either of the parties is, whether or not the court below had jurisdiction of the case within the true meaning of the eleventh section of the judiciary act of 1789, the material part of which is as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a *chose in action* to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned.

In the case of a tortious taking, or wrongful detention of a *chose in action* against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the

time of the injury. The distinction, as it respects the application of the eleventh section of the judiciary act to a suit concerning a *chose in action*, is this: where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but, if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.

The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a state other than that of the tenant in possession, whether the mortgagee could have maintained it or not within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. 7 How., 198. This distinction is stated by Mr. Justice Grier, in the case of *Sheldon v. Sill*, 8 How., 441 (§§ 1194–95, *infra*).

The learned justice, in delivering the opinion of the court in that case, observed “that the term *chose in action* is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party the right to recover a personal chattel or sum of money from another, by action.” This paragraph has been relied on to sustain the plea in question; but other portions of this opinion will show that by the phrase “right to recover a personal chattel” was not meant a recovery in specie, or damages for a tortious injury to the same, but a remedy on the contract for the breach of it, whether the contract was for the payment of money or the delivery of a personal chattel. Indeed, upon a close examination, this is the fair import of the language used, as he was speaking of the contract in the instrument assigned, not of the sale or transfer of it.

We have looked simply at the question of jurisdiction in the case, as that is the only question raised by the plea, and as we are satisfied that the demurrer to it is well taken, the judgment of the court below should be reversed, with costs, and proceedings remitted, with directions that judgment be given for the plaintiff that the defendant answer over.

TANEY, C. J., and JUSTICES CATRON, DANIEL and CAMPBELL dissented.

Dissenting opinion by MR. JUSTICE CATRON, DANIEL, J., concurring.

The defendant, Dodge, was treasurer and tax collector of Cuyahoga county in Ohio for the year 1852. There was assessed on the tax list of that year against the Bank of Cleveland, \$10,580; against the Merchants' Bank of Cleveland, \$7,965; on the Canal Bank of Cleveland, \$9,216; and on the Commercial Bank of Cleveland, \$11,981 — making \$38,981. These respective amounts were distrained in bank-notes from each bank, and deposited by the tax collector with the Cleveland Insurance Company to his credit. As the four banks whose property was distrained were incapable of suing the tax collector (who was a citizen of Ohio) in the circuit court of the United States, they joined in a written transfer of the bank-notes to John G. Deshler, the plaintiff, a citizen of New York, and he obtained a writ of replevin, and process founded on it, out of the circuit court of the United States, and declared as a citizen of New York.

The defendant, Dodge, pleaded in abatement, alleging that the causes of action are not within the jurisdiction of the court; to which plea there was a demurrer.

§ 1184. *When plea in abatement the proper defense.*

The first question is whether this plea in abatement is the proper defense, or should the plea have been in bar. The plea sets forth the distress for taxes due and unpaid from the banks to the state; that the defendant, Dodge, was the tax collector, and had the proper authority to make the distress, and did distrain, by virtue of his authority. By the laws of England replevin does not lie for goods taken in execution; nor in cases where goods are taken by distress according to an act of parliament, this being in the nature of an execution. 7 Bac. Ab., Replevin and Avowry, C., 71; 6 Comyns' Digest, Replevin, D., 218; *Ilseley v. Stubbs*, 5 Mass., 283, per Parsons, C. J. So the statute of Ohio, under which the proceeding in this case was had, gives the writ of replevin and prescribes the mode of proceeding, requiring an affidavit from the owner (or his agent) that the goods were his, that they are wrongfully detained by the defendants; "and that said goods and chattels were not taken in the execution, on any judgment against said plaintiff, nor for the payment of any tax, fine or amercement assessed against the plaintiff;" and it is further provided that any writ of replevin, issued without such affidavit, shall be quashed at the costs of the clerk issuing it; and that he and the plaintiff shall be liable in damages to the party injured. This affidavit Deshler made, and got the property into his possession on giving bond as the law requires. The plea distinctly shows that the property was in a condition not to be taken by the writ of replevin, and that the circuit court had no jurisdiction to issue the writ, or in anywise interfere with the property by that suit in replevin; and there being no jurisdiction to try title, or proceed further, the plea in abatement was the proper one. And so are the American decisions. *Shaw v. Levy*, 17 Serg. & R., 99.

§ 1185. *The transfer of property adversely held is champerty at common law. Such transfer can give no jurisdiction.*

The next question is, whether these corporations could lawfully assign to a third person their rights of action to property out of their possession, and held adversely? On common law principles, such an assignment is champerty. Blackstone says (vol. 4, 135), champart, in French law, signified a similar division of profits: "In our sense of the word, it signifies the purchasing of a suit, or right of suing; a practice so much abhorred by our law that it is one main reason why a *chose in action*, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretense to sue in another's right." I am not aware that this, as a general rule, has been disputed. It therefore follows, as I think, that the assignment was void, and that the causes of action belonged to the four banks as if it had never been made; and they alone, having the right to sue in any form, and being citizens of Ohio, no power to interfere with the tax collector, Dodge, or the property distrained, existed in the United States court.

A principal objection that I have heard urged is, that as the plea sets forth matter in bar, and commences and concludes in abatement, it is bad for this reason. If we were allowed to rely on such a barren technicality, the assumption is not well founded. In a replevin for goods the defendant may plead property in another (or that the goods were taken in execution), either in abatement or bar. 1 Chit. Pl., 446; *Ilseley v. Stubbs*, 5 Mass., 284-5; 1 Johns., 380; 1 Salk., 5. As the plaintiff had no title that he could assert, it is of no conse-

quence to him who has, say some of the authorities; but if this second ground was doubtful, it is cured by the act of jeofails.

The thirty-second section of the judiciary act declares that no proceeding in civil causes shall be quashed or reversed, for any defect or want of form, but that the courts shall proceed and give judgment according to the right of the cause without regarding such defects or want of form in any pleading, except in cases of demurrer, where the party demurring shall have specially set down and expressed in his demurrer the causes thereof. The demurrer here is general, and no mere technicality was allowable. "The right of the matter in law," in this case, involves a very grave consideration, such as would, in all probability, deeply disturb the harmony of the Union, if tax payers in larger classes could combine together, let their property be distrained, and then assign it to a third person, a citizen of another state, and on the same day, as in this case, take it from the state authority by a federal court writ, and let it be taken beyond the state's jurisdiction.

It was said by the supreme court of Pennsylvania, in a case where property had been seized for taxes due, and taken from the officer's possession by a writ of replevin, "that the court will not support this form of action in such a case, nor suffer such an abuse of their process. If one man may bring replevin where his goods have been taken for taxes, so may every other person; and thus the collection of all taxes might be evaded. Independently of the act of assembly, we are bound to quash this writ." *Stiles v. Griffith*, 3 Yeates, 82.

I deem the case before us to have been a very disreputable proceeding. The officers of these banks could not make the necessary oath required to obtain a writ of replevin; and to evade the laws of Ohio, the device of an assignment of their separate causes of action to a non-resident was resorted to, who could swear that this property was not distrained for his taxes, and thus apparently comply with the law, so far as an oath was required; whereas he violated its spirit, to bring into a tribunal of the Union a controversy that a state court would not sanction, by practicing a fraud on the laws of Ohio, and a fraud on the constitution of the United States. And what adds to the grossness of this transaction is, the attempt to assign and vest in this plaintiff divers causes of action, by separate assignors, thus seeking to practice champerty in a form and to an extent not heretofore devised. If four could assign, and their claims be combined in one suit, by the assignee, so could as many hundreds. To sanction the validity of an assignment to a non-resident, of property adversely held, and let him sustain a suit for it, would throw open the United States courts to every matter of litigation where property was in dispute exceeding the value of \$500. I feel quite confident that the constitution did not contemplate this mode of acquiring jurisdiction to the courts of the Union, and am of opinion that the judgment of the circuit court, sustaining the plea, ought to be affirmed.

CORBIN *v.* COUNTY OF BLACK HAWK.

(15 Otto, 659-667. 1881.)

APPEAL from U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE BLATCHFORD.

STATEMENT OF FACTS.—This case comes into this court on an appeal by the plaintiff below from a decree dismissing the amended and substituted bill of complaint on demurrers thereto for want of jurisdiction. The defendants are the county of Black Hawk, in the state of Iowa, the auditor and the treasurer

of that county, and thirty other individuals. The original bill was filed in November, 1874. The citizenship of the plaintiff as a citizen of New York, and of all the defendants as citizens of Iowa, is properly alleged. The bill avers that in 1857 one John Kerr, as school commissioner of the county, being thereunto duly authorized by the laws of Iowa, made eleven several contracts in writing in respect to the sale of land,—four with one person and one with each of seven other persons. A copy of one of the contracts is made part of the bill, each being averred to be in like words and figures, except the name of the purchaser, the description of the land, and the amounts of money mentioned. It is in these words:

“SCHOOL FUND COMMISSIONER’S OFFICE,
“BLACK HAWK COUNTY, July 10, 1857.

“Contract made and entered into between John Kerr, as school fund commissioner for the county of Black Hawk, Iowa, and Abraham Carey, of the county of Black Hawk and state of Iowa, to wit:

“The said John Kerr, school fund commissioner, as authorized by law, has bargained and sold, and by these presents does bargain and sell, to the said Abraham Carey, the following described tract or parcel of land, being a portion of section numbered 16 (or lands in lieu thereof), granted to the state for the use of schools by an act of congress entitled ‘An act supplemental to the act for the admission of the states of Iowa and Florida into the Union,’ approved March 3, 1845, to wit: Lot No. 10, being the west ($\frac{1}{2}$) half of the southeast ($\frac{1}{4}$) quarter section sixteen (16), township eighty-nine (89) north, of range fourteen (14) west, containing eighty acres.

“The price agreed upon is \$9.05 per acre, amounting to the sum of \$724, the one-fourth part of which, to wit, \$181, has been paid in cash to the said school fund commissioner, and the balance, to wit, \$543, secured by a promissory note, bearing even date herewith and payable on or before ten years from date, bearing interest at the rate of ten per centum per annum, payable annually, on the 1st day of January, at the office of the said school fund commissioner, in Black Hawk county.

“Now, if the said Abraham Carey, his heirs, executors or administrators, shall pay or cause to be paid the interest on said note as the same falls due, together with the principal, within the time specified, then he will be entitled to receive from the governor of the state of Iowa a patent for the land herein described. In case of failure to make any of the payments aforesaid punctually as stipulated, all previous payments shall be considered forfeited, and the land subject to be sold by the school fund commissioner, or the payment of the money enforced according to law, at the option of said commissioner.

“In testimony whereof the parties have hereunto set their hands and seals the day and year first above written.

(Signed)

“JOHN KERR, [L. s.]

“School Fund Commissioner of Black Hawk County.

“ABRAHAM CAREY.

“In presence of—

“D. J. COLEMAN.”

The bill alleges that the cash payment specified in each contract was made; that the promissory note specified in each contract was made and delivered; that a record of each sale was duly made, as provided by law; that each of the several persons to whom the lands were sold “made divers payments of money,” which were credited upon their several notes by the proper officers

of the county, but the plaintiff cannot set forth particularly the dates and amounts of the payments; that the notes and the amounts due thereon are held by the county as valid claims against their makers; that by the said premises the several purchasers became the owners of the several tracts of land; that the legal title to the lands remained vested in the county; that on the payment of the balance of said moneys the county was bound to cause the lands to be conveyed to the several purchasers or their assigns; that afterwards the several purchasers, for money considerations, respectively made and delivered to the plaintiff certain "conveyances," a copy of one of which is made part of the bill, each of the others being averred to be in like substance and effect, except the name of the grantor and the description of the lands conveyed; that the "conveyances" were duly filed in the office of the auditor of the county; and that thereby the plaintiff became the owner of the several contracts and the several tracts of land. Such copy is in these words:

"Know all men by these presents, that I, Wm. H. McClure, in consideration of the sum of \$100 in hand paid to me by Austin Corbin, of Kings county, state of New York, the receipt whereof is hereby acknowledged, do hereby sell and convey to the said Austin Corbin all the interest in the following described land, viz.: Lots numbers (3) three, eleven (11) and twelve (12), being the north half of the northeast quarter, and the east half of the southeast quarter of section sixteen (16), township eighty-nine (89) north, of range number fourteen (14) west of the fifth principal meridian, in Black Hawk county, Iowa, which was conveyed to me by contract, now on file in the office of the county auditor of Black Hawk county, Iowa, made by and between John Kerr, school fund commissioner of said county, and Wm. H. McClure, for the conveyance of said lands, and I hereby sell and assign to said Corbin all my rights under said contract, covenanting with him that I have not sold, assigned or transferred the same to any person or persons.

"In witness whereof I have hereunto set my hand this 1st day of July, 1871.
WM. H. MCCLURE.

"In presence of—

"DAN'L W. FOOTE."

Indorsed on back as follows:

"This assignment filed in my office this 1st day of July, A. D. 1871.

"D. W. FOOTE, Auditor."

The bill further alleges the willingness of the plaintiff to pay to the county the amount remaining unpaid on the notes, being the balance of the purchase money of the several tracts of land; that in January, 1872, he offered to pay it to the auditor of the county; that in October, 1874, he tendered to the auditor and to the treasurer \$16,197.69, as and for the payment of the balance remaining unpaid on the purchase money of the several tracts of land, and all interest thereon; that said sum was more than sufficient to pay the balance; that said officers failed to accept the money so tendered, and refused to state whether they accepted or refused to accept it; that he then and there became entitled to demand the issue of certificates of the payment of the moneys provided to be paid in said several contracts, and then and there did demand the issue of the same, which was refused; that he brings into court for the use of the defendants the amount so tendered, to wit, \$16,197.69, for the purpose of completing and perfecting the said tender, and to enable the defendants to accept the same, if they elect so to do, at any time; that, in case said moneys should be found insufficient in amount for said purposes, he offers to pay and

bring into court such further sum as may be found to be necessary; that the said several contracts are valid and subsisting; that the county has never undertaken to rescind them, or given notice of an intention to do so, or commenced suit to enforce payment of the purchase money, or to foreclose the equities of the plaintiff or of his grantors; that no forfeiture of the contracts could lawfully be made by said county; that the defendants other than the county and its said two officers severally claim to have some title to or interest in the lands, or some part thereof; that pursuant to said last mentioned sales, patents have been issued for the lands, or some of them, to the defendants, or some of them, by the governor of the state of Iowa, but the plaintiff cannot more particularly state the facts in respect to the issue of the patents; that the plaintiff is the lawful owner of the several tracts of land; and that the issue of said patents has vested the legal title to said premises in the patentees therein named. The prayer of the bill is that the subsequent sales of the several tracts of land, and the patents, and all conveyances of the lands by the patentees, be decreed to be void and of no effect as against the estate of the plaintiff; that his title to said premises be forever quieted as against the defendants claiming any interest in the lands; that each of them be enjoined from setting up any interest in said premises under the sales and the patents issued thereunder; that the said patentees, and their several grantees, be decreed to hold the legal title to said lands as the trustees of and for the plaintiff; and that they be compelled to convey the same to the plaintiff upon such terms as to the court may seem just and equitable. Three separate demurrers were filed to the amended bill; one by the county of Black Hawk, one by its auditor and its treasurer, and one by the remaining defendants. In each of the demurrers one of the causes of demurrer assigned is, that it does not appear upon the bill that the circuit court has jurisdiction of the alleged causes of action or of the parties, or that the plaintiff's several assignors could have maintained actions in the circuit court against the demurring defendants upon the said several contracts. The court states in its decree that it had heard argument upon the question of jurisdiction, and upon no other, and that it dismissed the amended bill upon the ground that it had no jurisdiction of the cause.

§ 1186. *Where the single matter in dispute is a sum greater than five thousand dollars, it is immaterial that the amount is made by the aggregation of several amounts less than five thousand dollars.*

The first point taken by the appellees is, that the appeal ought to be dismissed for want of jurisdiction in this court, on the ground that the matter in dispute does not exceed the sum or value of \$5,000, exclusive of costs. The view urged is that the interest of each of the appellees who is alleged to have an interest in some of the lands in question is several; that each several interest is not shown to exceed the value of \$5,000; and that the county of Black Hawk and its officers are not necessary or more than formal parties to the suit. But the allegations of the bill, which must be taken as true, for the purposes of this case, are, that although, under the contracts, the patents for the lands are to be issued by the governor of the state, the notes and the amounts due thereon are held by the county, the money is to be paid to the county, and the tender was made to the officers of the county who are defendants. The matter in dispute between the appellant and the county is the sum of \$16,197.69, which he tendered to its officers, and which they did not accept. Under the contracts the purchaser is entitled to receive a patent from the governor only on paying the notes, which are alleged to be held by the county. To obtain the relief

asked for in the bill the plaintiff must first pay that sum to the county in discharge of the notes. His title cannot be quieted as prayed for, as against the adverse claimants of the lands, until his contract obligations to the county are fulfilled. Therefore, the county and its said officers are real parties to the suit, and the matter in dispute as to them is the sum so tendered.

§ 1187. *A suit to enforce a specific performance of a contract is a suit to recover the contents of a chose in action.*

Although the amended bill in the record was filed in July, 1878, the counsel for the respective parties have stipulated in this court, in open court, that the suit in the circuit court was originally begun in November, 1874. The question of the jurisdiction of the circuit court is, therefore, to be determined under that clause of section 629 of the Revised Statutes which provides that "no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." There can be no doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands. It is equally clear that, by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land, and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. The only question for consideration is whether the suit is one to recover the contents of the contracts.

The appellant contends that the suit is not one to recover the contents of a chose in action; that it is not even founded upon the contracts; and that it is only a suit to determine the validity, force and effect of certain transactions which occurred subsequently to the making of the contracts, whereby certain rights adverse to those existing under the contracts are claimed to have arisen. It is urged that the appellant does not prosecute the suit in his character of assignee, but prosecutes it because a cause of action has accrued to him through the act of the county officers in refusing to accept the tender, and through the assertion by the other individual defendants of an adverse title to the lands. But we cannot take this view of the case. The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise. The promise to receive the money stipulated in these contracts to be paid by the purchasers, as a foundation for their right to receive patents, is, so far as this suit is concerned, the essence of

the contracts; and a suit to compel the acceptance of that money is a suit to enforce such promise, and, therefore, is a suit to recover the contents of the contracts. This principle was settled in the early case of *Serè v. Pitot*, 6 Cranch, 332 (§§ 1188–89, *infra*), under section 11 of the act of September 29, 1789, ch. 20, which is re-enacted in section 629 of the Revised Statutes. There the plaintiffs were the general assignees of the effects of an insolvent debtor by operation of law. It was contended that the statute applied only to a voluntary assignment of a particular chose in action, and that the word “contents” did not apply to accounts or unliquidated claims, but was confined to transferable paper. But the court held that the statute intended to except suits in virtue of equitable assignments as well as suits in virtue of legal assignments, and to exclude from the federal courts the assignee of all the open accounts of a merchant, as well as the same person when the assignee of a particular note. The court say: “The term ‘other chose in action’ is broad enough to comprehend either case, and the word ‘contents’ is too ambiguous in its import to restrain that general term. The ‘contents’ of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account.” Following out this principle, the obligation or the promise contained in a contract is its contents, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents.

In *Deshler v. Dodge*, 16 How., 622, 631 (§§ 1183–85, *supra*), it is said by the court that the statute in question applies to cases “in which the suit is brought to recover the contents or to enforce the contract contained in the instrument assigned;” and that, where the suit is brought to enforce the contract contained in the chose in action, the assignee is disabled, unless the suit might have been brought in the court if no assignment had been made. Again, in *Bushnell v. Kennedy*, 9 Wall., 387 (§§ 1181–82, *supra*), it is suggested by the court that the restriction applies to rights of action founded on contracts which contain within themselves some promise or duty to be performed, and that such contracts may be properly said to have contents. The amended bill in this case contains no averment showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made; and it is well settled that this is necessary. *Turner v. Bank of North America*, 4 Dal., 8 (§ 1098, *supra*); *Mollan v. Torrance*, 9 Wheat., 537; *Bank of United States v. Moss*, 6 How., 31 (§§ 53–59, *supra*); *Bradley v. Rhines*, 8 Wall., 393 (§§ 1096–97, *supra*).

We are, therefore, of opinion that the circuit court had no jurisdiction of this suit. Its decree will be affirmed, with the modification that the dismissal of the bill is without prejudice to the right of the plaintiff to bring any suit he may be advised in the proper court; and it is so ordered.

SERÈ v. PITOT.

(6 Cranch, 332–338. 1810.)

ERROR to U. S. District Court, District of Orleans.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was brought in the court of the United States for the Orleans territory by the plaintiffs, who are aliens, and syndics or assignees of a trading company composed of citizens of that territory, who have become insolvent. The defendants are citizens of the territory, and have

pleaded to the jurisdiction of the court. Their plea was sustained, and the cause now comes on to be heard on a writ of error to that judgment.

Two objections are made to the jurisdiction of the district court: 1. That the suit is brought by the assignees of a *chose in action* in a case where it could not have been prosecuted if no assignment had been made. 2. That the district court cannot entertain jurisdiction because the defendants are not citizens of any state.

§ 1188. *A general assignee of an insolvent cannot sue in a federal court unless his assignor could have sued.*

The first objection rests on the eleventh section of the judicial act (1 Stats. at large, 78), which declares "that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." The plaintiffs are admitted to be the assignees of a *chose in action*, but it is contended that they are not within the meaning of the provision which has been cited, because this is a suit for cash, bills and notes generally, by persons to whom the law transfers them, and not by such an assignee as is contemplated in the judicial act. The words of the act are said to apply obviously to assignments made by the party himself, on an actual note or other *chose in action* assignable by the proprietor thereof, and that the word "contents" cannot, by any fair construction, be applied to accounts or unliquidated claims. Apprehensions, it is said, were entertained that fictitious assignments might be made to give jurisdiction to a federal court, and, to guard against this mischief, every case of an assignment by a party holding transferable paper was excepted from the jurisdiction of the federal courts, unless the original holder might have sued in them.

Without doubt, assignable paper, being the *chose in action* most usually transferred, was in the mind of the legislature when the law was framed, and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity in his own name, and there would be as much reason to exclude him from the federal courts as to exclude the same person, when the assignee of a particular note. The term "other *chose in action*" is broad enough to comprehend either case, and the word "contents" is too ambiguous in its import to restrain that general term. The "contents" of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account.

The circumstance that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a *chose in action* in favor of an assignee, which suit could not have been prosecuted if no assignment had been made; and is therefore within the very terms of the law. The case decided in 4 Cranch, 306 (ACCOUNTS, § 21), was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term "assignees," and are, therefore, not within the words of the act. That case,

therefore, is not deemed a full precedent for this. It is the opinion of the court that the plaintiffs had no right to maintain this suit in the district court against a citizen of the Orleans territory, they being the assignees of persons who were also citizens of that territory.

§ 1189. *Rights of citizens of Orleans to sue in the district court of that territory.*

It is of so much importance to the people of Orleans to decide on the second objection, that the court will proceed to consider that likewise. Whether the citizens of the territory of Orleans are to be considered as the citizens of a state, within the meaning of the constitution, is a question of some difficulty, which would be decided, should one of them sue in any of the circuit courts of the United States. The present inquiry is limited to a suit brought by or against a citizen of the territory, in the district court of Orleans. The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.

The court possesses the same jurisdiction which was possessed by the court of Kentucky. In the court of Kentucky, a citizen of Kentucky may sue or be sued. But it is said that this privilege is not imparted to a citizen of Orleans, because he is not a citizen of a state. But this objection is founded on the idea that the constitution restrains congress from giving the court of the territory jurisdiction over a case brought by or against a citizen of the territory. This idea is most clearly not to be sustained, and, of consequence, that court must be considered as having such jurisdiction as congress intended to give it.

Let us inquire what would be the jurisdiction of the court on this restricted construction. It would have no jurisdiction over a suit brought by or against a citizen of the territory, although an alien, or a citizen of another state, might be a party. It would have no jurisdiction over a suit brought by a citizen of one state, against a citizen of another state, because neither party would be a citizen of the "state" in which the court sat. Of what civil causes, then, between private individuals, would it have jurisdiction? Only of suits between an alien and a citizen of another state who should be found in Orleans. Can this be presumed to have been the intention of the legislature in giving the territory a court possessing the same jurisdiction and power with that of Kentucky? The principal motive for giving federal courts jurisdiction is to secure aliens and citizens of other states from local prejudices. Yet all who could be affected by them are, by this construction, excluded from those courts. There could scarcely ever be a civil action between individuals of which the court could take cognizance; and if such a case should arise, it would be one in which no prejudice is to be apprehended.

It is the unanimous opinion of the court that, by a fair construction of the act, the citizens of the territory of Orleans may sue and be sued in that court in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

Judgment affirmed, with costs.

WILKINSON v. WILKINSON.

(Circuit Court for Rhode Island: 2 Curtis, 582-585. 1856.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is a suit in equity to which George Wilkinson, a citizen of the state of Connecticut, and Hiram M. Barney, a citizen of the state of Illinois, were originally the parties plaintiff, and the administrators of William Wilkinson, deceased, and Benjamin Fessenden, all citizens of Rhode Island, are the parties defendant. The bill states that Abraham and Isaac Wilkinson mortgaged certain real and personal property to the deceased, William Wilkinson, conditioned to indemnify him against certain liabilities he was under, or might incur for the mortgagors, with a power of sale in case of breach of condition; that subsequently the mortgagors conveyed the equity of redemption of the mortgaged premises, together with other property, to William Wilkinson, Nathaniel Searle, the plaintiff Barney, and the defendant Fessenden, in trust to sell the same, and to apply the proceeds to pay particular creditors of the assignors, of whom the plaintiff, George Wilkinson, was one.

The bill further states that William Wilkinson, in his life-time, made sales under the powers contained in the deeds of mortgage, fully reimbursed himself for all his payments, and extinguished all his liabilities for the mortgagors, and had in his hands a surplus for which he ought to have accounted to the assignees of Abraham and Isaac Wilkinson. That Searle, one of the assignees, is dead; and that the surviving assignees, for a valuable consideration, have sold and assigned to the plaintiff, George Wilkinson, all their right and title to what remained in the hands of William Wilkinson, as above stated. The bill prays for an account, by the administrators of William Wilkinson, of the moneys received by him under the sales of the mortgaged property, and of the disposition thereof, and that the balance may be decreed to be paid to George Wilkinson as assignee thereof.

§ 1190. *An equitable assignee of a claim to an account is within the restriction in the eleventh section of the judiciary act of 1789.*

The eleventh section of the judiciary act of 1789 (1 Stat. at Large, 78) declares "that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made." I am of opinion that an equitable assignee of a claim to an account is within this restrictive clause. In *Serè v. Pitot*, 6 Cranch, 335 (§§ 1188-89, *supra*), Mr. Chief Justice Marshall, speaking of a suit in equity by an assignee of an account, says: "Without doubt, assignable paper, being the *chose in action* most usually transferred, was in the minds of the legislature when the law was framed; and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts as to exclude the same person when the assignee of a particular note. The term, 'other *chose in action*,' is broad enough to comprehend either case, and the

word 'contents' is too ambiguous to restrain that general term. The contents of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account."

§ 1191. *The right to an account of sales of mortgaged property is a chose in action.*

No substantial distinction, in this respect, can be made between a right to an account of sales of mortgaged property and any other right to an account. They are all *choses in action* within the meaning of this law. They are rights to recover sums of money by means of suits; and whether the right be legal or equitable, whether the assignment thereof passed a legal title so as to enable the assignee to sue in his own name at law, or only an equitable title, to be asserted through the aid of a court of chancery, it was equally the purpose of this restrictive clause to prevent the citizenship of the assignee from enabling him to come into a court of the United States. Such, in general, was the view taken of it by the supreme court in *Sheldon v. Sill*, 8 How., 441 (§§ 1194-95, *infra*); and which was not modified by *Deshler v. Dodge*, 16 How., 622 (§§ 1183-85, *supra*), which explained its meaning.

§ 1192. *An assignee from two trustees cannot sue unless both his assignors could have sued.*

The true inquiry here is, therefore, whether the plaintiff's assignors could have sued in the circuit court on the title shown by this bill. And it is manifest they could not, for one of them is a citizen of Rhode Island. It is urged, however, that Barney, one of the surviving assignees of A. and I. Wilkinson, might have brought his bill against his co-assignee, Freeman, and the administrators of William Wilkinson, and alleged that he joined Freeman as a defendant to compel him to do his duty in collecting the money, and paying it to creditors. That such a bill might be sustained may be admitted. But it would be a case differing widely from the one shown by this bill, which shows that both assignees, Freeman and Barney, in the execution of their trust, have sold this claim to the plaintiff, George Wilkinson. They have no further duty, as assignees, to perform in the collection of this money; and, consequently, one of them, upon the present state of facts, could not allege that the other should be made a defendant to compel him to discharge any trust as to this account.

George Wilkinson is the assignee of both Freeman and Barney. It was necessary that both of them should join to make him any title. *Wilbur v. Almy*, 12 How., 180. Both did join; one is as much his assignor as the other, or, rather, being but trustees, both united convey one entire title. Unless both could have sued upon this title if no assignment had been made, the assignee cannot sue. And he cannot escape the difficulty by suggesting that, if no assignment had been made, there might have arisen such a state of facts that a court of equity would have allowed one of the trustees to represent and enforce the whole title. I cannot presume that Freeman would have refused to do his duty, and join in a suit for an account, if anything was due.

§ 1193. *Where a cestui que trust buys the entire equitable interest he loses the interest of a cestui que trust, and acquires that of a purchaser.*

It is further urged that George Wilkinson, being a *cestui que trust* under the assignment of A. and I. Wilkinson, may sustain this bill in his own right. But the creditors of A. and I. Wilkinson have no longer any equitable interest in the account for which this bill is filed. The right to an account having been sold and assigned by the trustees, for a valuable consideration, in the execution

of their trust, the purchase money is substituted in place of the right; and George Wilkinson as a creditor and *cestui que trust* has no right therein. The entire interest belongs to him as a purchaser. My opinion is that the bill must be dismissed for want of jurisdiction.

SHELDON v. SILL.

(8 Howard, 441-450. 1849.)

APPEAL from U. S. Circuit Court, District of Michigan.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The only question which it will be necessary to notice in this case is, whether the circuit court had jurisdiction.

Sill, the complainant below, a citizen of New York, filed his bill in the circuit court of the United States for Michigan, against Sheldon, claiming to recover the amount of a bond and mortgage, which had been assigned to him by Hastings, the president of the Bank of Michigan. Sheldon, in his answer, among other things, pleaded that “the bond and mortgage in controversy, having been originally given by a citizen of Michigan to another citizen of the same state, and the complainant being assignee of them, the circuit court had no jurisdiction.”

The eleventh section of the judiciary act, which defines the jurisdiction of the circuit courts, restrains them from taking “cognizance of any suit to recover the contents of any promissory note or other *choses in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange.” The third article of the constitution declares that “the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish.” The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies “controversies between citizens of different states.”

§ 1194. Congress, having power in its discretion to confer jurisdiction upon the courts of its own creating, has power also to withhold it.

It has been alleged that this restriction of the judiciary act, with regard to assignees of *choses in action*, is in conflict with this provision of the constitution, and therefore void. It must be admitted that if the constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by congress. But as it has made no such distribution, one of two consequences must result,—either that each inferior court created by congress must exercise all the judicial powers not given to the supreme court, or that congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The constitution has defined the limits of the judicial power of the United

States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction cannot be in conflict with the constitution, unless it confers powers not enumerated therein. Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary. In the case of *Turner v. Bank of North America*, 4 Dal., 10 (§ 1098, *supra*), it was contended, as in this case, that, as it was a controversy between citizens of different states, the constitution gave the plaintiff a right to sue in the circuit court, notwithstanding he was an assignee within the restriction of the eleventh section of the judiciary act. But the court said: "The political truth is, that the disposal of the judicial power, except in a few specified instances, belongs to congress; and congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the constitution might warrant." This decision was made in 1799; since that time the same doctrine has been frequently asserted by this court, as may be seen in *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. United States*, 12 Pet., 616; *Cary v. Curtis*, 3 How., 245.

§ 1195. *A bond secured by a mortgage is a chose in action within the eleventh section of the judiciary act.*

The only remaining inquiry is, whether the complainant in this case is the assignee of a "*chose in action*," within the meaning of the statute. The term "*chose in action*" is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another, by action. It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel interest, while the mortgagor is treated as the true owner. The land will descend to the heir of the mortgagor. His widow will be entitled to dower. But on the death of the mortgagee, the debt secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it can be used only for the purpose of obtaining satisfaction of the debt. The heir will be but a trustee for the executor.

In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security or lien on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy by execution for the balance. The complainant in this case is the purchaser and assignee of a sum of money, a debt, a *chose in action*, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is, therefore, the "assignee of a *chose in action*," within the letter and spirit of the act of congress under consideration, and cannot support this action in the circuit court of the United States, where his assignor could not.

The judgment of the circuit court must therefore be reversed, for want of jurisdiction.

M'MICKEN v. WEBB.

(11 Peters, 25-39. 1837.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.— This case comes before this court on a writ of error from the district court of the United States in and for the eastern district of the state of Louisiana.

The suit in the court below was commenced by petition, in which the cause of action is set out informally, but substantially, as follows: That the defendants are jointly and severally indebted to the plaintiff in the sum of \$4,866.93, besides interest and costs. For this, to wit: That some time in the year 1815, the petitioner and one James H. Ficklin formed a copartnership and did business in the parish of Feliciana in the state of Louisiana, under the name and firm of M'Micken and Ficklin; that on or about the 8th day of September, 1817, said partnership was dissolved by mutual consent. That at the time of such dissolution there was a quantity or stock of goods on hand, which Ficklin took and purchased at cost with five per cent. addition, and for the payment of one-half of said stock of goods he gave to the petitioner a promissory note, dated the 20th of September, 1817, and payable on the 1st of March, 1819, to the order of M'Micken and Ficklin, for the sum of \$4,866.93, which note was executed by said Ficklin, Jedediah Smith (by the name of Jed. Smith) and Amos Webb, by which they promised jointly and severally to pay the aforesaid sum according to the terms of said note, a copy of which is annexed to the petition. The petition avers that the note was made and dated subsequent to the dissolution of the partnership, and although made payable to M'Micken and Ficklin, it was made for the sole benefit of the petitioner, M'Micken, and that Ficklin was in nowise interested therein except as one of the obligors. The petition then sets out the death of Jedediah Smith, and here the other defendants become bound to pay the note. It also contains an averment that the petitioner is a citizen of the state of Ohio, and that the defendants are citizens of the state of Louisiana.

To this petition several pleas to the jurisdiction of the court are interposed. The defendant Webb, in one of his pleas, admits that he is a citizen of Louisiana, and that he was in New Orleans when the petition and citation were served upon him; but avers that he resides in the parish of St. Landry, in the western district of Louisiana, and denies the jurisdiction of the court on this ground. The second plea in abatement is founded on the fact which is set out in the petition, that the note in question is made payable to M'Micken and Ficklin, and the suit is in the name of M'Micken alone, without showing any assignment by Ficklin, or that, at the time of making said note, M'Micken and Ficklin could have prosecuted a suit upon it in this court.

The third plea alleges a want of jurisdiction in the court, because the petition does not allege that at the time of assigning said note the payees might have prosecuted the makers in this court. The other defendants also interposed pleas to the jurisdiction of the court, upon the grounds substantially as set forth in the last two pleas of Amos Webb. The court below sustained these pleas to the jurisdiction of the court, and dismissed the petition.

§ 1196. *Requisites of the commencement of a suit at law under Louisiana practice.*

This petition, although informal in many respects, must be considered as the commencement of a suit at law, according to the course of proceedings in the

courts of the state of Louisiana, and is properly brought up here by writ of error. The object of the petition is simply to set forth the cause of action, and praying that the defendants may be cited in court to answer to the demand set up against them; and all that is required in such petition according to the practice in Louisiana is, that it should contain a clear and concise statement of the object of the demand, or the cause of action upon which it is founded.

§ 1197. *A citizen residing in one state may be sued by a citizen of another state in any district of the former in which he is found and served, though he does not reside in such district.*

The question presented by the first plea to the jurisdiction of the court is whether Webb, a citizen of the state of Louisiana, who resided in the western district of that state, could be sued by a plaintiff who was a citizen of the state of Ohio, in the district court of the eastern district of the state of Louisiana. The residence of Webb being in the western district of Louisiana could not affect the jurisdiction of the court. The plea admits that he was a citizen of Louisiana, and the act of congress (1 Stats. at Large, 78) gives jurisdiction where the suit is between a citizen of the state where the suit is brought and a citizen of another state; and the division of a state into two or more districts cannot affect the jurisdiction of the court on account of citizenship. This plea admits that the petition and citation were served upon him in New Orleans, which takes the case out of the prohibition in the judiciary act, that no civil suit shall be brought in the courts of the United States against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

§ 1198. *Where a note is declared on as being payable to two persons for the sole benefit of the plaintiff, who is one of them, and that the other has no interest therein, the plaintiff is not an assignee within the meaning of the prohibition in the judiciary act.*

The second plea to the jurisdiction of the court is founded on the assumption that the plaintiff, M'Micken, is to be considered as the assignee of M'Micken and Ficklin of the note in question, and that the petition does not allege that they could have prosecuted a suit upon it in the courts of the United States; and that the case therefore falls within the prohibition in the judiciary act: That no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. Vol. 2, Laws U. S., 61. But the cause of action, and the right of the plaintiff to sustain it, do not place him in the character of assignee. Ficklin never had any interest whatever in the note, according to the allegations in the petition; the partnership had been dissolved before the note in question was given. The consideration thereof was M'Micken's share of the stock and goods on hand at the time of the dissolution of the partnership; and the petition avers that, although the note is given in the name of the late firm of M'Micken and Ficklin, it was for the sole and individual benefit of the petitioner, and that Ficklin was in nowise a party or interested therein, except as one of the obligors; there was, therefore, no interest which Ficklin could assign, and the objection is one purely of form and of a mere technical character; which ought not to be noticed according to the course of proceedings in the courts of Louisiana. The facts set forth in the petition may well be considered

as an averment that the note was given to the petitioner, M'Micken, under the name and description of M'Micken and Ficklin. And this view of the case disposes of the matter set up by the other defendants in their pleas to the jurisdiction of the court, as well as of that which is set up in the third plea to the jurisdiction of the court.

There are other pleas to the merits interposed, *de bene esse*, by all the defendants, and which have not, of course, been in any manner considered or disposed of by the court below, as the pleas to the jurisdiction of the court were sustained and the petition dismissed. Nor does the record contain the necessary matter to enable this court to dispose of the case upon its merits; some of those turning upon questions of fact, the evidence to sustain which not all appearing upon the record; and the cause must therefore necessarily go back for further proceedings on those pleas.

The judgment of the court below is accordingly reversed, and the cause sent back for further proceedings.

CHAMBERLAIN v. ECKERT.

(Circuit Court for Illinois: 2 Bissell, 126-130. 1869.)

STATEMENT OF FACTS.—In this case there was a plea of another action pending; replication that the other suit had been dismissed, and demurrer to the replication. The demurrer being overruled, the defendant, without leave of court, demurred to the declaration, and the plaintiff moved to take the demurrer from the files. The jurisdictional facts are stated in the opinion.

§ 1199. *Question of practice; judgment on demurrer; leave to plead.*

Opinion by DRUMMOND, J.

The plaintiff, when the demurrer to the replication was overruled, was entitled to judgment upon the demurrer. Before the defendant could rejoin to the replication or take any action in relation to the case, leave must have been granted by the court. The proper judgment of the court would follow upon the demurrer as a necessary consequence. It is known, however, that as a general thing the court is very liberal in the exercise of its discretion, and allows a demurrer to be withdrawn and issues of fact to be taken. But in this case no rejoinder was put in, but the defendant demurred to the declaration. I have, however, as it is a question of jurisdiction and might come up hereafter, examined the declaration. It is upon an assigned promissory note, and avers that the plaintiff is a citizen of Vermont, and that the assignor of the note is a citizen of Missouri, and that the defendant is a citizen of Illinois. I am satisfied that the court has jurisdiction of the case. The ground taken by the defendant is that it must appear upon the face of the declaration, where an action is brought upon a promissory note by an assignee, that the assignor could have brought suit upon the note before he assigned it. The question is whether that is correct.

§ 1199a. *The assignee of a promissory note, being otherwise competent, may sue in a federal court upon it if at that time the assignor could have done so.*

The clause in the eleventh section of the judiciary act is: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. at Large, 78. The question is, to what time does the language "might

have been prosecuted" apply? Does it apply to the time when the assignor held and owned the promissory note, or to the time when the suit is brought? If a promissory note is made by a citizen of Wisconsin to a citizen of the same state, and as such assigned by him to a citizen of New York, at the time that the assignor held the note he could not bring a suit in a federal court of Wisconsin against the maker, because he was a citizen of the same state with the maker; neither could the assignee, a citizen of New York, bring a suit in a federal court of Wisconsin while the assignor remained a citizen of Wisconsin; but if the assignor ceased to be a citizen of Wisconsin, then, as I take it, a suit could be brought in the federal court of Wisconsin by the assignee and holder of the note, because, then, being in the position as "if no assignment had been made," he, a citizen of New York, could bring a suit. The assignor, who had ceased to be a citizen of Wisconsin, could, while he was holder of the note, bring suit in the federal court of Wisconsin, because he had changed his residence and his citizenship and become a citizen of another state.

But if the rule contended for by the defendant is the true rule, then no change in the *status* of the payee after the assignment could ever enable a party to bring a suit, and it might happen where the note was executed by the maker to the payee of another state, and at the time of the commencement of the suit in the federal court he was of the same state with the maker, the suit could be maintained by the assignee, a citizen of another state, because you have to look, according to the view of the defense, to the *status* of the parties at the time that the assignor held the note. And if he ever could have prosecuted the suit, the assignee could prosecute it, although at the time when the suit is brought the payee and maker are citizens of the same state. That would be the necessary consequence, and the question recurs, what does the language of the statute mean, "unless the suit might have been prosecuted in said court if no assignment had been made?"

I think it means at the time the suit was prosecuted, so that if it appears then that the assignor could have maintained the suit if no assignment had been made, the assignee, being a citizen of another state, can maintain the suit. The only authority mentioned contrary to this view is to be found in the cases of *Rogers v. Linn*, 2 McL., 126, and *Fry v. Rosseau*, 3 McL., 106. I admit that those two cases seem to imply that the question is, what is the *status* of the assignor at the time he held the *chose in action* — the promissory note? But these cases are not very fully reported, and apparently proceed upon an erroneous view of this clause of the eleventh section of the judiciary act. It should be observed, however, that the attention of the court was not drawn to the distinction between the *status* of the assignor at the time he was the owner of the note and at the time the suit was brought. It does not seem that point was at all considered by the court, in order that the proper discrimination might have been made, and therefore I cannot say but that if the attention of the court had been directed to the point which is now presented, it might have used different language from that we find in the reported cases.

§ 1200. *If the payee of a note, being a citizen of the same state with the maker, remove to another state, he can sue in a federal court on the note.*

In this case admit that the maker and payee were citizens of Illinois. The plaintiff, a citizen of Vermont, sues in this court. Now, what is his *status*? Suppose there had been no assignment of this promissory note. It appears upon the face of the declaration that the assignor, at the time the suit was brought, could have maintained an action in this court in the contingency

named. He is averred to be a citizen of the state of Missouri, so that the language of the act (unless the suit might have been prosecuted in such court if no assignment had been made) applies to him. It cannot be pretended that, when a note is made by a citizen of one state to a citizen of the same state, the payee cannot remove to another state, and after he has so removed, and become a citizen thereof, bring a suit in a federal court against the maker in the district where he resides. That can scarcely be claimed. So that the maker and the payee, both being citizens of Illinois at the time this note was made, by the removal of the payee, LeRoy D. Dewey to Missouri, he certainly could have maintained a suit on this note against the maker in the federal court of the district in which the maker resides, if no assignment had been made, and that being so, this plaintiff can maintain the action. The opinion now given accords with one reported some years since. *Thaxter v. Hatch*, 6 McL., 68 (§ 1201, *infra*).

A further illustration may be suggested by considering the time of the maturity of the note. If the maker and payee of the note sued on, in this case, were both citizens of Illinois when it was made, then the right of the assignee to sue in this court would depend, if I understand the argument of the defendant, upon the fact whether the payee was a citizen of Missouri when the note matured, and was the owner, and so himself had the right to sue; in other words, that the payee must have first become a citizen of Missouri and allowed the note to mature before assignment, for both must concur to enable the assignor to sue in this court. And this, I think, demonstrates the error of the argument; because the claim is, if the payee, after the maturity of the note and after the assignment, became a citizen of Illinois at the commencement of the suit by the assignee, the court would still have jurisdiction, whereas, according to my reading of the statute, the fact that the assignor of the note is a citizen of Illinois at the commencement of the suit would be fatal to the jurisdiction of the court.

The motion must be sustained and demurrer stricken from the files.

THAXTER v. HATCH.

(Circuit Court for Illinois: 6 McLean, 68-70. 1853.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—This is a bill to foreclose a mortgage given by Reuben Hatch and James Wilson on some land in Pike county, to John Preston. The mortgage was executed to secure some promissory notes, part of the purchase money of the land. They were made payable to Preston, who assigned them to the plaintiff. At the time of the assignment, both Preston and the plaintiff were citizens of Massachusetts. When the suit was brought Preston had ceased to reside in Massachusetts, and had become a citizen of Illinois. The mortgage itself had never in form been assigned by Preston to the plaintiff, and the only right of the plaintiff was founded on the fact that the note had been duly indorsed to him. It is objected that under this state of facts the court has no jurisdiction of the case. In the eleventh section of the judicial act of 1789, there is the following clause: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other cause in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

§ 1201. *The fact that at one time a federal court would have had jurisdiction does not give such jurisdiction, if before suit brought the assignor becomes incompetent to sue.*

Whatever doubts may have heretofore existed on the subject, the case of *Sheldon v. Sill*, 8 How., 441 (§§ 1194–95, *supra*), decides that the kind of contract upon which this action is brought is a chose in action or promissory note within the meaning of this act of congress. That was a case of bond secured by mortgage. This is a case of promissory notes secured by mortgage. The plaintiff is therefore an assignee of a chose in action, and the only question is whether, within the meaning of the act, a suit might have been prosecuted if no assignment had been made. In the case referred to the citizenship of the parties remained the same; the contract was made in the state where the suit was brought, and between citizens of that state. Here, the contract was made in Massachusetts, and Preston, when he assigned the notes, was a citizen of that state; and it is insisted that inasmuch as a suit could at one time have been brought by Preston, he could not by his own act deprive the plaintiff of the right to sue in the courts of the United States, that right existing at the time of the assignment. The question is, what is the limitation of the restriction? Is it general, or is it confined to *the time* of the commencement of the suit? It is true that at one time a suit might have been prosecuted if no assignment had been made; but before any suit was brought the assignor became a citizen of Illinois, and consequently he could not have brought suit there if no assignment had been made, because the controversy would not have been between citizens of different states.

It has been uniformly held, that when the courts of the United States have once acquired jurisdiction, by virtue of the citizenship of the parties, it cannot be ousted by a change of residence; but as I understand this rule, it only applies when jurisdiction has actually vested by the commencement of a suit. There can be no doubt that, as a general rule, the jurisdiction depends upon the character of the parties at the time the suit is brought; and this is the only inquiry for the court in these cases. And I think the same rule must be adopted in this case. The limitation is confined to the time when the suit is commenced. *Morgan v. Morgan*, 2 Wheat., 290; *Mollan v. Torrance*, 9 Wheat., 537; *Dunn v. Clarke*, 8 Pet., 1; *Clarke v. Mathewson*, 12 Pet., 171 (§§ 634, 635, *supra*).

The bill must accordingly be dismissed for want of jurisdiction.

UNITED STATES *v.* GREENE.

(Circuit Court for Maine: 4 Mason, 427–434. 1827.)

STATEMENT OF FACTS.—This suit was brought in the district court of Maine, and was dismissed for want of jurisdiction. The United States sued as indorsee of a promissory note, made by the defendants to the bank of Passamaquoddy, and indorsed by the bank to the United States. There was a plea to the jurisdiction, to the effect that the defendants were citizens of Maine, and that the bank was established in Maine and composed of citizens of that state.

§ 1202. *Quære: Whether under the judiciary act of 1789 the United States as assignee could have maintained suit where its assignor could not.*

Opinion by STORY, J.

It is quite unnecessary in the present case to consider whether the plea to the jurisdiction be drawn with perfect technical accuracy or not, as it is well

settled that sufficient matter must appear upon the record to support the jurisdiction of the court, otherwise the suit must be dismissed. The question, then, is whether, upon the matter apparent on the record, the district court possessed jurisdiction of the suit; and this question must be decided exclusively by the true construction of the acts of congress conferring and limiting the jurisdiction of the national courts.

The ninth section of the judiciary act of 1789, chapter 20, declares that the district courts shall have cognizance "of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of \$100." The present case falls completely within this description; it is a suit by the United States at common law, and the matter in dispute exceeds \$100. There would be an end of all controversy, therefore, if the legislative provisions stopped here. The other parts of this section confer all the other jurisdiction belonging to the district courts generally; and (the observation is material) it gives no right to any individual to sue in those courts, with the single exception of causes "where an alien sues for a tort only, in violation of the law of nations or a treaty of the United States." The tenth section of the act, however, gives to the district courts of Kentucky and Maine the additional jurisdiction of all other causes, except of appeals and writs of error, which are made cognizable in the circuit courts. It may be remarked, in passing, that this section has now become inoperative by the establishment of distinct circuit courts in each of these states.

Then comes the eleventh section, upon which alone the difficulty arises. It provides that the circuit courts shall have original cognizance "of all suits at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." And afterwards comes the following clause: "And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; *nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange.*" The terms of this latter clause are exceedingly broad and strong: "Nor shall *any* district or circuit court have cognizance," etc.; and if they are to be understood without any limitation whatsoever, they clearly extend to the present case. Yet there are considerations which might induce one to pause and to inquire whether such could have been the legislative intention. Whether congress could have intended to exclude the United States from suing in their own courts in cases in which the government became legally possessed, by assignment, of notes or other choses in action, whatever might be the sum in controversy. The arguments urged at the bar on this subject are not without great weight. In the first place this limitation is found in a section whose main object is to fix the jurisdiction of the circuit courts. It deals, indeed, with process in the district courts also, but not so much to ascertain their jurisdiction as to prescribe when and where process shall be served and be returnable. In the next place, the clause respecting assignments of notes and choses in action manifestly proceeds upon the supposition that, but for such restriction, suits might be brought by private

indorsees or assignees in the courts to which it refers. The language is not such as would naturally be used if suits by the government in the district courts generally had been in contemplation. The restriction would then pertinently and properly have found its place, not in the eleventh, but in the ninth, section of the act. Now, no private indorsees or assignees can sue in any cases in any district courts, excepting such as exercise circuit powers, for no private persons but aliens can sue at all therein, and they in certain classes of torts only. The legislature cannot be presumed to make, in the same act, a universal restriction to be applied to all the district courts, when, from the nature of its own prior provisions, it cannot, even potentially, be applied to more than two, viz., Kentucky and Maine. The fair construction of the terms under such circumstances is to restrain their generality; to look to the primary and leading intention of the provisions, and to restrain the words to obvious cases. Effect may thus be given to the whole language without breaking in upon a very important national policy. In this view of the subject, the words, "*any* district or circuit court," include only such courts as private indorsees or assignees might generally and ordinarily sue in but for the restriction, that is to say, circuit courts properly so called, and district courts exercising the jurisdiction of circuit courts. The clause would thus correctly apply to the district courts named in the tenth section and exclude those in the ninth section.

The argument thus pressed upon the court is fortified by various considerations of a different nature. It is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication. See Com. Dig., Parliament, R. 8 R., 16; Co. Lit., 90*b*.; 1 Bl. Com., 261; *Stoughton v. Baker*, 4 Mass., 522, 528; *United States v. Hoar*, 2 Mason, 312; Bac. Abr., Prerog., E., 5; Ballantine, Limit., ch. 2, p. 18. Here the jurisdiction is clearly given by the words of the ninth section, and it is incumbent upon those who assert that it is restrained by another section, to establish the fact beyond all doubt. To show that the subsequent words may be so applied, is not sufficient; it must be shown that they were actually used for such a purpose. Now the case of the government is neither within the policy nor the mischiefs contemplated by the clause. It was foreseen that if no restriction of this nature were interposed, the jurisdiction of the courts of the United States might, by fraudulent or friendly assignments, be extended to almost all classes of contracts between citizens of the same state. This would be a manifest evasion of the constitution in its limits upon the judicial power. This was the mischief to be remedied. But the case of the government is not within the mischief. It is not presumable that the government would countenance a fraud of this nature. It could have no interest and no means to accomplish it. It could have no temptation to withdraw private suits from their proper forum; and it could not be betrayed into such a course by any of its agents without immediate detection. On the other hand, the constitution meant to preserve to the government itself the right to sue in its own courts in all cases, and thus secure the power of enforcing its own just demands. The act of 1789, chapter 20, may be presumed to have intended to confer this jurisdiction in all cases except of a very small nature. In the ordinary course of its operations, the government must become possessed of various pecuniary interests by assignment, of notes and bills and other choses in action, not merely by purchase, but, as in the case before the court, by assignment from its own insolvent debtors, who might be incapable of giving any other security for their debts to the public. Some

of such assignable securities or rights of property might be wholly of an equitable nature. And it could scarcely escape the notice of congress that in several states in the Union no state courts of equity existed at that period, or were likely to be created. So that in the case of some assigned equitable interests, upon the rigid construction of the act of 1789, now contended for, the government would be wholly without remedy in any court whatsoever. And even in respect to assignments of choses in action of a legal nature, the remedy would often be imperfect, dependent upon local jurisprudence, and in many instances wholly inadequate for the public exigencies. The importance, nay the vital necessity, of a prompt and efficient means of collecting the public debts and revenues could not be overlooked by the national legislature; and no just jealousy could arise from its choice of its own tribunals to preserve the public faith, and sustain the public interests. The argument, indeed, in this aspect, goes to the extent of creating an implied exception of assignments to the government, not only in the district but in the circuit courts. Its just force is not, however, diminished by this consideration.

There is another suggestion, which is not without influence in the interpretation of the restrictive clause. It manifestly was intended to apply to assignments, which are cognizable in equity as well as at law. Now the district courts generally have no jurisdiction over equity causes. Suits of this nature can be brought only in the circuit courts, or in the district courts exercising the same powers. The restrictive clause, then, while it furnishes an appropriate limitation to equity suits in the latter courts can have no possible operation on the former, for no such suits can be brought therein. It is true, that effect may be given to the whole clause as to all courts, *reddendo singula singulis* by applying it *pro tanto* to the jurisdiction of each respectively. But the question will still remain, whether this be the natural or just construction. If upon the common rule of construing statutes the government is not deemed to be included within general words, what reason is there for setting aside that rule in the present case? Does not every reason of sound policy point the other way? In cases of the statute of limitations, however broad the terms of the statute, the government is never held bound, unless expressly named. Yet the policy of such an exemption is not more apparent than it is in the present case.

The train of reasoning, urged at the bar with such an impressive effect, and of which the foregoing is but an imperfect outline, would, upon the language of the act of 1789, alone suspend my mind in no inconsiderable doubts. I have never been able to persuade myself that congress could, in the clause under consideration, have had the case of the government in contemplation. Neither the mischief to be provided against, nor the public policy to be promoted, seems to embrace such a case. If ever there was a case in which the general words of a statute would justify a court in interposing a limitation of meaning upon them, I can scarcely imagine one stronger than the present. Yet the words are so direct and positive that I am not sure that I should have been brought to sustain the jurisdiction, if the act of the 3d of March, 1815, chapter 253, had not relieved my doubts.

§ 1203. *Under the act of March 3, 1815, the United States may sue where its assignor could not.*

That act (section 4) provides "that the district courts of the United States shall have cognizance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority

of any act of congress, shall sue, although the debt, claim, or other matter in dispute shall not amount to \$100." The interpretation of this section has been settled by the supreme court, in *The Postmaster-General v. Early*, 12 Wheat., 136, a case of no inconsiderable difficulty. It was decided that it conferred general jurisdiction, unlimited by amount, upon the district courts, and by consequence upon the circuit courts, *of all suits at common law*, where the United States, or any officer thereof under any act of congress, shall sue. Supposing, therefore, the restriction of the eleventh section of the act of 1789 to apply to suits of the government in whatever courts instituted, this restriction, not being incorporated into the act of 1815, leaves its general words in full force. The latter silently operates a repeal of all antecedent limitations which it does not recognize and continue, upon the known principle that the general authority given by a subsequent statute must be presumed to have intentionally superseded every prior statute inconsistent with its provisions.

Upon this view of the matter I am of opinion that the jurisdiction of the district court is well founded upon the first count, founded on the negotiable note. But there happens to be another count in the declaration for \$3,000, money had and received, against which no objection to the jurisdiction can be urged, since it does not purport to be founded upon any assignment, and the court cannot presume it. It is, however, proper to state that the existence of this count was never brought to the notice of the district court, and was first suggested upon the argument here. The dismissal of the suit would, for this cause alone, be unmaintainable; but as the other was the real ground of controversy, I have felt it my duty to examine and decide it.

Judgment reversed.

SACKETT *v.* DAVIS.

(Circuit Court for Michigan: 3 McLean, 101, 102. 1842.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action was brought upon four promissory notes, described as payable to William P. Thompson, or bearer. The declaration alleges the citizenship of the parties to the suit, but the citizenship of Thompson is not averred, and on this ground a question of jurisdiction is raised.

§ 1204. *A note payable to one or bearer may be sued on by the holder in the circuit court irrespective of the citizenship of his assignor.*

If the plaintiff had sued as assignee, this objection would be fatal, as it would be necessary to show that suit might have been brought in this court by the assignor at the time of the assignment. But the plaintiff does not sue as assignee, but as holder of the notes. The defendant promised to pay to Thompson, or bearer. Now the promise is to pay to either, and either may bring the action in his own name. The property in the note passes by delivery. And in such a case nothing more need be shown by the person who sues, than that he is the holder of the notes, or the bearer. The case is not within the provision of the act of congress in relation to the assignment of notes, etc. The ground taken is not sustainable. Judgment for the plaintiff.

CAMPBELL *v.* JOHNSON.

(Circuit Court for Arkansas: Hempstead, 534-536. 1847.)

STATEMENT OF FACTS.—This was *assumpsit*, by the indorsee of a writing obligatory, a citizen of Tennessee, against a citizen of Arkansas, who was the

immediate indorser of the plaintiff and the payee of the obligation. Two causes of demurrer were assigned: 1. That it did not appear from the declaration that the indorsee could have sued the maker. 2. That *assumpsit* will not lie on a sealed instrument.

§ 1205. *An indorsee may sue his indorser in the federal court irrespective of the citizenship of the maker.*

Opinion by the COURT.

A suit may be brought in the circuit court by an indorsee against his immediate indorser whether a suit could be there brought against the maker or not. In such a case, the plaintiff does not claim through an assignment. It is a new contract, entered into by the indorser and indorsee, upon which the suit is predicated, and if the indorsee is a citizen of a different state he may bring an action against his indorser in the circuit court. This rule has been established and acted on by the supreme court in several cases, and must be considered as settled law. *Young v. Bryan*, 6 Wheat., 146, 151; *Evans v. Gee*, 11 Peters, 83 (BILLS AND NOTES, §§ 1178-82).

It is true that where an indorsee of paper other than a foreign bill of exchange sues a remote indorser, and is obliged to trace his title through intermediate persons, he must show that they could have sustained an action in the circuit court. *Mollan v. Torrance*, 9 Wheat., 537. He there claims, not in virtue of a new contract, but through an assignment and in the character of assignee, and comes directly within the prohibition of the eleventh section of the judiciary act of 1789, unless he can show that the intermediate indorsers were suable. 1 Stat., 79. This is not that kind of a case, and the principle does not apply.

§ 1206. *Liability of parties to negotiable paper under Arkansas law.*

As to the second cause of demurrer, it is sufficient to observe that this suit is not founded upon the writing obligatory, but is predicated on an indorsement of it by the defendant to the plaintiff. If it was made in this state, as seems to be admitted at the bar, it is negotiable paper, and all indorsers or assignors become equally liable with the original maker, obligor or payee, on receiving due notice of the non-payment or protest of the instrument. R. S., 108. The writing obligatory is properly set out in the declaration to give a history of the case, and to show the amount for which the defendant is liable on his indorsement. The indorsement, as already observed, constitutes a new contract, upon which this suit is founded. The undertaking of the defendant is not under seal, but arises solely from the indorsement, and consequently the action is well brought. 1 Chitty, Pl., 118.

Demurrer overruled.

IRVINE v. LOWRY.

(14 Peters, 293-300. 1840.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—This suit was instituted in the court of common pleas of Warren county, Pennsylvania, whence it was removed to the circuit court for the western district of that state, pursuant to the provisions of the judiciary act of 1789, section 12, and comes before this court on a certificate of division of opinion between the judges of that court, on a motion to remand the cause for want of jurisdiction. Irvine, in whose name the suit is brought, is a citizen of Pennsylvania; the Lumberman's Bank of Warren is a corporation chartered by a law of that state, and located at Warren; part of the stockholders are

citizens of New York, of which state the defendant is also a citizen. The suit is brought upon a paper, of which the following is a copy:

“\$53,000.

WARREN, PA., 6 September, '37.

“Three months after date, I promise to pay to the order of Guy C. Irvine, Esq., fifty-three thousand dollars, in the office notes of the Lumberman's Bank at Warren, and payable at their banking-house in Warren, Pa.

“N. A. LOWRY.”

Indorsed on side, “GUY C. IRVINE.”

§ 1207. *The appearance of defendant waives his privilege as to the district in which the judiciary act requires him to be sued.*

The suit was commenced by the process of foreign attachment, agreeable to the law of Pennsylvania; the property of the defendant was attached according to its provisions, whereupon he appeared, and by his counsel moved for the removal of the cause; and having complied with the requisitions of the judiciary act, the cause was ordered to be removed to the circuit court. By thus approving and submitting to the process of attachment, the defendant waived any privilege to which he was entitled by the section of the judiciary act, as held by this court in *Toland v. Sprague*, 12 Pet., 330, 331, so that on his appearance and entry of bail, the attachment was dissolved, and the cause will thenceforth proceed as if it had commenced by the ordinary process of the court, served on the defendant within the district. The commencement of the action in the common pleas, by attachment, being expressly provided for in the twelfth section of the judiciary act, it must be considered, when removed into the circuit court, as an original one.

§ 1208. *The court cannot exercise jurisdiction over a corporation unless all the stockholders are within the jurisdiction. (Overruled.)*

This brings us to the question raised in the argument of the plaintiff's counsel, whether that court can exercise any jurisdiction over the case, on the ground that the defendant, and some of the stockholders of the bank, are citizens of New York, which would be a fatal objection to the jurisdiction, if the corporation is to be considered as the plaintiff and sole party in interest. On this subject the decisions of the court have been uniform, and, as declared in the present term, in *The Vicksburg Bank v. Slocomb*, 14 Pet., 60, have settled this point decisively; nothing then remains but to ascertain from the record, as certified, whether the bank is the real plaintiff; for if they are not, then as Irvine is admitted to be a citizen of Pennsylvania, and Lowry of New York, the jurisdiction is undoubted.

§ 1209. *In suits upon assigned non-negotiable choses in action, the assignor, in whose name suit is brought, is deemed the party plaintiff, and if he may sue in the federal courts they have jurisdiction.*

The paper on which the suit is brought is not negotiable by the usage or custom of merchants; it is payable to order; the promise is to pay so many dollars, but not to pay any certain sum of money; it is a promise to pay the amount “in the office notes of the Lumberman's Bank at Warren,” which are not money, and at most a chattel. Not being a promissory note, either by the law merchant, the statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by indorsement; and, not being under seal, it is not assignable by the act of assembly on that subject relating to bonds. The bank, therefore, cannot sue in their own name, in virtue of the indorsement of Irvine in blank; nor could they so sue if it was specially indorsed to them, because the legal right of action would still remain in Irvine, though the equitable

interest in the thing promised may have passed to the bank. This case, however, is not of that description; the only evidence of any transfer of the contents of the note is the blank indorsement of Irvine, and the affidavit of the president of the bank, in the latter of which it is stated that the note was received by the bank from the defendant, at the time it bears date, as a security for his previous indebtedness thereto; and that Irvine had not then or since any interest in said note, except as a guarantor for its payment, and the solvency and sufficiency of the drawer.

In referring to the affidavit, we are not to be understood that, whatever may be its contents, they would influence our decision; yet, assuming the case to be as there stated, the legal right of action is in Irvine; the paper is not the evidence of an original debt, contracted by a discount thereof, or its reception as payment of a pre-existing debt due the bank; it is only a collateral security by adding the name of Irvine as indorser. Standing as such to the bank, their rights are derivative through him; and as the indorsement passes only an equity, the legal interest is in him; he is the real plaintiff in a court of law, in which legal rights alone can be recognized. This consideration points to the true line of discrimination between this and the case of *Browne v. Strobe*, 5 Cranch, 303, which was a suit against an executor on his administration bond, given to the justices of the peace of the county where the testator died, and who were citizens of the state of Virginia, as well as the defendant. The jurisdiction of the circuit court was sustained on the ground that, though the plaintiffs and defendants were citizens of the same state, the former were mere nominal parties, without any interest or responsibility, and made by the law of Virginia the mere instruments and conduits through whom the legal right of the real plaintiff could be asserted; as such their names must be used, for the bond must be given to them in their official capacity; but as the person to whom the debt was due was a British subject, he was properly considered as the only party plaintiff in the action. Whatever right of action existed in virtue of the bond passed by the operation of the law of Virginia directly to the person for whose benefit it was given, through the conduit appointed for that purpose. For such and kindred cases, the person or officer thus selected by the law as its agent is not a party to the suit, and no transfer of the bond or other security to the person intrusted is necessary to invest him with a complete legal interest or right of action; but cases of this description cannot be applied to actions like the present, in which the interest and responsibility of the parties to the paper depend on their contract, and the law neither dissolves nor transfers any legal right of action on or to the party who accepts it as security for payment of a pre-existing debt.

We are, therefore, of opinion that the circuit court has jurisdiction of the case, and direct that it be so certified.

BEVERLY v. DAVIDSON COUNTY.

(Circuit Court for Tennessee: 2 Flippin, 507-509. 1879.)

STATEMENT OF FACTS.—*Assumpsit*, by a citizen of Virginia, the indorsee of certain county warrants. The warrants were drawn in favor of Samuel Donelson and indorsed by him. They were not payable to *order* or *bearer*.

Opinion by BAXTER, J.

Plaintiff's declaration presents a question of jurisdiction which must be met and disposed of at the threshold. He sues on what is familiarly known

as a "county warrant;" insists that it is negotiable, and that, as assignee thereof, he can, under the act of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts," etc., maintain his action in this court. His position is correct, provided he can bring his case within the purview of that act. But this is the point in regard to which we think he fails.

§ 1210. *County warrants are not negotiable by the law merchant, and hence are not within the act of March 3, 1875.*

The negotiability of written promises to pay money has been greatly extended by state legislation. The statute of Tennessee may be cited as an example. Here, "bills, bonds and notes for money, whether expressed to be payable to order or bearer, or not," are made negotiable "in the same manner as promissory notes." But the act of 1875 does not profess to confer jurisdiction on the federal courts in favor of assignees of negotiable paper generally, but in favor of assignees of promissory notes negotiable *by the law merchant*. This law merchant is a distinct branch of jurisprudence as well defined and understood as the law of descent. It prevails in this and in every other enlightened commercial country. In restricting the jurisdiction to assignees of notes negotiable by the law merchant, we must assume that congress intended to convey the meaning which the language of the act clearly imports. It is not necessary, therefore, that I should pass on the question whether the warrant which is the foundation of this suit is or is not negotiable under the Tennessee statute, and we purposely decline to express any opinion on that point. But we have no hesitation in holding that it is not negotiable by the law merchant. It follows that this court is without jurisdiction, and plaintiff's suit will be dismissed.

PORTER v. CITY OF JANESVILLE.

(Circuit Court for Wisconsin: 3 Federal Reporter, 617-620. 1880.)

Opinion by BUNN, D. J.

STATEMENT OF FACTS.—This action is brought by the plaintiff, who is a citizen of Massachusetts, against the city of Janesville, in Wisconsin, to recover the amount of a certain bond for the sum of \$1,000 and interest, issued by the defendant to the Rock River Valley Railroad Company, a corporation in Wisconsin, and assignee to the plaintiff.

The following is a copy of the bond:

"UNITED STATES OF AMERICA,

"STATE OF WISCONSIN,

"JANESVILLE, July 1, 1853.

"\$1,000.

JANESVILLE SCRIP.

No. 47.

"This certifies that the city of Janesville is indebted to the Rock River Valley Union Railroad Company in the principal sum of \$1,000, payable to said company or its assignees at the end of twenty years from the 1st day of July, 1853, with interest at the rate of eight per cent. per annum, payable semi-annually in the city of New York, on delivery of the interest warrants hereto annexed, as they shall respectively become payable, until said principal sum is fully paid. In testimony whereof, and pursuant to a vote of the common council and citizens of the city of Janesville, in a city meeting duly notified

and held for that purpose, I, A. Hyatt Smith, mayor of said city, hereunto subscribe my name, and cause the seal of said city to be affixed.

“Dated at Janesville, July 1, 1853.

“Subscribed and sealed this 1st day of August, 1853.

“By A. HYATT SMITH, Mayor.

“Countersigned by J. W. HOBSON, Treasurer.”

Annexed to the bond set out in the complaint are forty coupons, for the payment of semi-annual interest, in this form:

“INTEREST WARRANT FOR FORTY DOLLARS.

“On the 1st day of July, 1873, the city of Janesville, Wis., will owe and will pay to the Rock River Valley Union Railroad Company, or bearer, \$40, being for the half-year yearly interest on city certificate No. 47, for \$1,000, payable in the city of New York.

J. W. HOBSON, Treasurer.”

The defendant demurs to the complaint, and the point relied upon is that the Rock River Valley Union Railroad Company, being a Wisconsin corporation, could not assign the bond to a citizen of Massachusetts so as to enable him to bring an action in this court; and the question presented is whether the bond in suit is a promissory note, negotiable by the law merchant, within the intent and meaning of section 1, chapter 137, of the act of March 3, 1875, defining the jurisdiction of circuit courts. It is contended by the defendant — *First*, that the instrument sued on is a bond and not a promissory note; *second*, that if a note, it is not negotiable by the law merchant, it not containing the words “bearer” or “order.”

§ 1211. *A municipal bond is a promissory note within the meaning of the act of March 3, 1875.*

In regard to the first point, sealed instruments of this character, providing for the payment of money at a future time, certainly have in this country, with very few exceptions, been held promissory notes rather than specialties. In fact, the instrument in suit answers every definition and requisite of a promissory note by the law merchant. It is not in form a bond, but it is a simple acknowledgment of indebtedness, and a promise to pay a certain sum of money at a time certain, without condition. And that is just what a promissory note is.

It was not the intention or object of the statute to except promissory notes and bills of exchange by name, but to except commercial paper that is negotiable by the law merchant; and the words “promissory notes” and “bills of exchange” were intended to include all negotiable paper, by whatever technical name it might be known. Municipal bonds of this character have always been held commercial paper by the United States courts, and it never could have been the intention of congress to distinguish between these and ordinary notes and bills, giving jurisdiction in one case and not in the other.

§ 1212. *The use of the words “bearer” or “order” is not necessary to make an instrument negotiable.*

The other point, that the instrument is not in form negotiable, is not tenable. Though the words “bearer” or “order” are more commonly used to denote an intention to make a note transferable by delivery or indorsement, they are by no means essential, and any other words, evincing such an intent, are equally efficient for such a purpose. The words “or its assignees,” used in the instrument, undoubtedly render the note capable of being negotiable, the same as though the words “or order” had been used. They show an intent to render them transferable from person to person. The fact of coupons being an-

nexed for the payment of semi-annual interest running to bearer, these being part and parcel of the bond itself, confirms this view, and evinces a like intent to place the bonds on the market as commercial paper. Indeed, the purpose of their issue being to aid in the construction of a railroad, and to raise money for that purpose, they would be of very little use to effectuate that object if they could not be transferred. See *City of Lexington v. Butler*, 14 Wall., 282, 293; *Brainerd v. N. Y. & H. R. Co.*, 25 N. Y., 496; *Blake v. Board Sup'rs S. Co.*, 61 Barb., 149; 3 Kent's Com., 77; Story on Notes (7th ed.), §§ 43 and 44, and cases cited; Daniel on Negotiable Instruments, § 1046; *Klauber v. Biggerstaff*, 47 Wis., 551.

The case of *Gregg v. Weston*, 7 Biss., 360 (§ 1213, *infra*), denying the jurisdiction of this court, is not in conflict with this view, as that case turned upon the construction of the Indiana statute, which provides in effect that unless a note is made payable to order, or bearer, at a particular bank, whatever equity the maker is entitled to against the payee he may assert against any indorsee; which means, of course, that a note is not negotiable in that state unless payable to order or bearer at a bank. In such a case it seems quite clear that an indorsee could not derive jurisdiction to sue in the United States courts by assignment, as such a note is not negotiable by the law merchant.

GREGG v. WESTON.

(Circuit Court for Indiana: 7 Bissell, 360-362. 1877.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—Gregg, a citizen of Ohio, sues Weston and Schultz, both citizens of Indiana, on a note executed by Weston to Schultz, and by the latter assigned to the plaintiff. The note, a copy of which is made a part of the complaint, was given at Kendallville, Indiana, August 4, 1870, payable to the order of M. G. Schultz. The defendants demur to the complaint on the ground that this court has no jurisdiction.

§ 1213. *A note is not negotiable by the law merchant, within the act of March 3, 1875, if by a state statute it is non-negotiable.*

Under the judiciary act of 1789, the circuit courts of the United States have no cognizance of any suit on a promissory note in favor of any assignee, unless a suit might have been prosecuted in such court on such note if no assignment had been made. It is admitted that under this statute this action could not have been maintained. But it is urged by the plaintiff that this court has jurisdiction of the action under the first section of the act to determine the jurisdiction of the circuit and district courts of the United States, approved March 13, 1875. 18 Stats. at Large, 470. That part of section 1 which is relied on by the plaintiff as conferring jurisdiction on this court reads as follows, viz.: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

In Indiana only notes payable to bearer or order at a bank in this state are negotiable as inland bills of exchange. 1 Davis' Indiana Statutes, 636, § 6. The question is, what is meant by the words "promissory notes negotiable by the law merchant" in the act of congress? The plaintiff insists that congress contemplated all promissory notes negotiable at common law or by the statute of Anne. I think congress meant, by this language, notes having the qualities

of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a *bona fide* purchaser for value before maturity, were subject to no equities in favor of the maker. The note sued on was given in Indiana and payable in Indiana, but not at a bank in this state, so that, by the law of Indiana, whatever equities the maker was entitled to as against the payee he may assert against any indorsee. That was the law of the contract. The statute of the state entered into and became a part of the note. *Holloway v. Porter*, 46 Ind., 62; *Dundas v. Bowler*, 3 McL., 397; *Brabston v. Gibson*, 9 How., 263 (BILLS AND NOTES, §§ 438-40).

The statute already cited makes all promissory notes negotiable so far as to vest the property in each indorsee successively, but unless a note is made payable to order or bearer at a particular bank in this state, it cannot be said to possess all the privileges or immunities of a note negotiable according to the law merchant. The statute of Anne has generally been adopted in this country, but has never been adopted in this state.

This opinion has been submitted to my brother Drummond, and he concurs therein. The defendant's demurrer is sustained.

SECKEL v. BACKHAUS.

(Circuit Court for Wisconsin: 7 Bissell, 354-357. 1877.)

Opinion by DYER, J.

STATEMENT OF FACTS.—By the demurrer to the bill the question is presented whether this court has jurisdiction of a suit in equity to foreclose a mortgage, prosecuted by a non-resident assignee, in a case where the assignor is a citizen of the state and district in which the mortgagor resides and the action is brought.

§ 1214. *The act of March 3, 1875, gives jurisdiction to the circuit court to foreclose a mortgage given to secure a note, at suit of the assignee, irrespective of citizenship of assignor.*

This question must be answered as we determine the construction to be given to the first section of the act of congress of March 3, 1875, relating to the jurisdiction of circuit courts of the United States. 18 Stat. at Large, part 3, p. 470. That act (section 1), after providing that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and . . . in which there shall be a controversy between citizens of different states," declares that "no circuit or district court shall have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." Prior to the passage of this act no suit at law upon a promissory note could be prosecuted in the federal court by the transferee or assignee of the note, in cases where the assignor, by reason of citizenship, could not have prosecuted such suit. By virtue of the enlarged jurisdiction conferred by the act, such an action may now be maintained by an assignee who is a citizen of another state, though it could not have been prosecuted by the assignor. Now, does the act give to the court jurisdiction to entertain a proceeding in equity in behalf of such assignee, to foreclose a mortgage given to secure promissory notes in a case where the assignor could not, because of citizenship, have prosecuted such a suit?

In *Osgood v. Chicago, Danville & Vincennes R. Co.*, 6 Bissell, 330, the circuit judge of this circuit, in construing the act of March 3, 1875, regarded it as the intention of congress, by that act, to consolidate in one act all the previous general acts conferring jurisdiction upon the circuit courts, and at the same time to give the court jurisdiction in some cases where no previous act of congress had conferred it. By the act not only is jurisdiction extended, but the right is given to remove causes from state to federal courts in cases where removals were never before authorized. The language of the first section includes suits of a civil nature in equity, as well as at common law; and another section of the act contains new and ample provisions for acquiring jurisdiction of non-resident parties in suits for enforcement of equitable and other liens. Reference is made to these features of the act as indicative of its spirit and general scope. A mortgage given to secure the payment of a promissory note is a mere incident to the note. It is extinguished by payment of the note. It passes with a transfer of the note. The debt is the principal thing, and the mortgage is collateral. No defense involving the validity of the debt can be set up against a mortgage in the hands of an assignee which cannot be set up against the debt itself. A mortgage is attached to the debt, and follows its destinies and ownership. It is beneficially assigned, transferred, released, surrendered, re-issued and revived with the instrument evidencing the debt, and without any other forms or ceremonies than are requisite in case of the latter. *Martineau v. McCollum*, 4 Chand., 153; *Croft v. Bunster*, 9 Wis., 503; *Blunt v. Walker*, 11 Wis., 334.

Although it was formerly held by the supreme court of the United States that, in a foreclosure decree, it could not be adjudged that the mortgagor pay a balance that might remain unsatisfied after exhausting the proceeds of the mortgaged premises (*Noonan v. Lee*, 2 Black, 500; *Orchard v. Hughes*, 1 Wall., 74), it is now provided by rule of that court, that, in suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due, over and above the proceeds of sale, and execution may issue for the collection of the same. 1 Wall., 3. In view of the relation which the mortgage bears to the debt, it may be accurately said that an action to foreclose the mortgage is founded upon the debt. It rests upon the principal contract, which is the note, and its object is the recovery of the debt by exhausting the security, which is the incident; and, as we have seen, the security being exhausted, the debtor may be pursued in the same proceeding by execution for any balance against his general property.

In *Sheldon v. Sill*, 8 How., 441 (§§ 1194-95, *supra*), cited in the argument, the court say that a mortgage is but a special security, and that the remedy obtained on it in a court of equity is but the satisfaction of the debt. "It is the pursuit, by action, of one debt on two instruments or securities, the one general, the other special." The jurisdiction invoked by bill to foreclose is appealed to for recovery of the debt, the evidence of which lies in the principal contract, the note. The mortgage following the debt, the holder of the debt has the equitable right to the security, and can therefore foreclose. As the result of this view of the question, I hold that, under the act of 1875, this court has jurisdiction in a suit in equity to foreclose a mortgage given to secure a promissory note where the assignee and holder is a citizen of another state, and the maker a citizen of this state and an inhabitant of this district, though the assignor could not, by reason of citizenship, have brought the suit. Demurrer overruled, with leave to answer.

STANLEY v. BOARD OF SUPERVISORS OF ALBANY COUNTY.

(Circuit Court for New York: 5 Federal Reporter, 254, 255. 1880.)

Opinion by WALLACE, D. J.

STATEMENT OF FACTS.—The complaint in this action must be dismissed, because the court has no jurisdiction of the controversy it discloses. The action is for money had and received, and is brought by the plaintiff as the assignee of Chauncey P. Williams, who, as appears by the complaint, was a resident of the city of Albany, in this state. The action involves the right of the defendant to retain certain sums of money collected as taxes, which the plaintiff alleges were illegally exacted.

§ 1215. *An assignee cannot maintain an action in the federal court to recover taxes illegally assessed against his assignor, unless the latter is also competent to sue.*

By the act of congress of March 3, 1875, it is provided that no circuit court shall have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. This act modifies section 11 of the act of September 24, 1789, known as the judiciary act, but not in a manner to affect the present question. The plaintiff's assignor could not have prosecuted the suit because he was a citizen of the same state with the defendant. This disposition of the case cannot be obviated by the fact that the defendant has not interposed a plea to the jurisdiction, or objected to the jurisdiction upon the trial or argument. The objection would be fatal whenever and wherever raised. In *Jackson v. Ashton*, 8 Pet., 148 (§§ 1083-84, *supra*), the supreme court reversed the decree of the court below, and dismissed the appeal when it did not appear in the bill of complaint that the parties were citizens of different states, although the counsel for the appellee was anxious that the court should hear and determine the case, and waived the objection. The court is not permitted to take cognizance of the controversy which has been brought before it. The complaint is dismissed accordingly.

COE v. CAYUGA LAKE RAILROAD COMPANY.

(Circuit Court for New York: 19 Blatchford, 522-529. 1881.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This suit was brought against the Cayuga Lake Railroad Company, as maker, and the defendant Morgan, as indorser, of two instruments in writing which the complaint calls promissory notes. Each defendant answered separately. At the trial before the court and a jury the plaintiff had a verdict for \$30,787.89. The defendant Morgan was mover for a new trial, on a bill of exceptions made by him. The instruments were alike in form, except that one was payable five months after date and the other six months after date. The form was this:

“\$10,000.

AURORA, N. Y., May 1, 1873.

“Five months after date the Cayuga Lake Railroad Company promises to pay to the order of Henry Morgan, president, \$10,000, at the office of Leonard, Sheldon & Foster, No. 10 Wall street, New York city, value received, with interest.

{ Seal of the Cayuga } { Lake Railroad Company. }	“The Cayuga Lake Railroad Company, by HENRY MORGAN, President.”
“T. DELAFIELD, Treasurer.”	

Across the back of each instrument was written the indorsement, "Henry Morgan, President." The signatures to the two instruments were the duly authorized signatures of the Cayuga Lake Railroad Company by the defendant Henry Morgan as its president. The said instruments were sealed with the seal of the company, which was duly impressed thereupon by the president and treasurer of said company, by its authority, at the time such signatures were made, and at that same time the indorsements upon the back of said instruments of the words "Henry Morgan, President," were made by the said Morgan. He was at that time the president of said company. There was due demand of payment and refusal, and due notice thereof was given to said Morgan. At the time of the commencement of this action, September 16, 1879, the plaintiff was a citizen of Connecticut and said Morgan was a citizen of New York. Said company was a local corporation in the interior of New York, having its line of road on the shore of Cayuga lake. The said notes were so made and indorsed for the purpose of being taken to the city of New York to raise money upon for the use of the company. For such purpose they were delivered to Mr. James R. Cox, as special agent for the company, who took them to New York and there had them cashed by Mr. James R. Stillman. Said Cox received the money from said Stillman, took it home with him and paid it over to the company for its use. At the trial, the defendant Morgan proved that the said instruments were, on or about the 3d of May, 1873, transferred by the agent and attorney in fact of said company to one James Stillman, who then was, and ever since has been, and still is, a citizen of New York, who discounted said instruments and paid the proceeds thereof to said agent, who paid over the same to the treasurer of said company; that the defendant Morgan was, on the said 3d of May, 1873, and still is, a citizen of New York; that, sometime after the maturity of said instruments, they were sold and transferred by said Stillman to the plaintiff; and that the defendant had no benefit of any part of the proceeds of said instruments. The defendant thereupon requested the court to instruct the jury to render a verdict for the defendant, or to dismiss the action, upon the ground that the said instruments are not promissory notes negotiable by the law merchant; and that, as this court would not have had jurisdiction of an action if brought thereon by said Stillman before the assignment thereof, therefore it had no jurisdiction of the same as brought by this plaintiff. The court declined and refused so to instruct the jury, or to dismiss the action, and held and decided that the court had jurisdiction of the action. To such refusal and dismissal the defendant duly excepted. The defendant also requested the court to direct a verdict for the defendant on the ground that the instruments sued upon were not promissory notes negotiable by the law merchant, but were sealed instruments; and that the signature of the defendant upon the back thereof did not create any obligation to pay the same. The court refused so to instruct the jury and the defendant excepted. The defendant further requested the court to direct a verdict for the defendant on the ground that, under the circumstances of this case, the signature of "Henry Morgan, President," on the back of the said instruments, is not an individual indorsement and does not create any individual liability. The court refused so to instruct the jury, and to such refusal the defendant excepted. The defendant then requested the court to submit, as a question of fact, to the jury, whether it was the intention of the said Morgan and the said Stillman, that the indorsements of the name of "Henry Morgan, President," upon the backs of said instruments, should create any individual liability

against the defendant Morgan. The court refused to submit such question to the jury, to which the defendant excepted. The court then, at the request of the plaintiff, directed the jury to render a verdict in favor of the plaintiff for \$30,787.89, being the amount of said instruments with the interest thereon. The defendant excepted to the ruling and decision directing the jury to render said verdict, and said verdict was rendered.

The question of jurisdiction is a controlling one, for, if this court has no jurisdiction of this action, the other questions raised are immaterial. It is provided by section 1 of the act of March 3, 1875 (18 U. S. Stats. at Large, 470), that no circuit court shall "have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." This suit is one founded on a contract made by the defendant Morgan. It is in favor of an assignee. The rights of action which Stillman had against the defendant Morgan were assigned by him to the plaintiff by the transfer of the said instruments by Stillman to the plaintiff after their maturity. As Stillman, from a time prior to the maturity of the instruments to the time of the trial, was always a citizen of New York, and as the defendant Morgan was, when the instruments were transferred to Stillman, and when this suit was commenced, and at the time of the trial, a citizen of New York, and there is nothing in the bill of exceptions to show that he was ever a citizen of a different state from Stillman, there is nothing to show that a suit could ever have been prosecuted in this court by Stillman against Morgan to recover against Morgan on his said contract, if Stillman had not made said assignment. It follows, therefore, that this court has no jurisdiction of this suit against said Morgan, unless this is a case of a promissory note negotiable by the law merchant, as it is not the case of a bill of exchange. As the suit against the defendant Morgan is brought as a suit on his indorsements of promissory notes, the case is a case of promissory notes, within the statute; it is a case of such indorsements.

The instruments, aside from the seal of the company, have all the qualities of promissory notes, and of promissory notes made by the company as a corporation. They are in the name of the company, it promises to pay, and it signs them by its president. But they were sealed with the seal of the company, and it was a corporation, and said seal was duly impressed on them by its president and treasurer, by its authority, at the time the notes were signed by it. From what appears in the bill of exceptions it may properly be inferred that the seal referred to was the corporate seal of the corporation, and that the words "Seal of the Cayuga Lake Railroad Company" appear impressed on the face of each instrument, as the impression of the seal referred to, though these facts are not thus distinctly stated in the bill of exceptions. The answer of the defendant Morgan states that the company was a corporation, and had and used a corporate seal, and that the said instruments were executed by it under its corporate seal. The instruments do not, in words, refer to a seal otherwise than as said impressions contain the words they do.

§ 1216. *A promissory note made by a corporation and sealed with its seal is not a promissory note negotiable by the law merchant within the act of March 3, 1875, section 1.*

In order to be within the exception in the statute, the instrument must not only be a promissory note, but must be one negotiable by the law merchant. There is no distinction made by the statute between a promissory note made

by an individual and a promissory note made by a corporation. If the instruments in question were made by an individual instead of a corporation, it would seem impossible, in view of long settled and well settled principles of law, to contend that, if they bore the seal as well as the signature of the individual, they were promissory notes negotiable by the law merchant. As an individual can make a promissory note and not add his seal to it, and can also make one and add his seal to it, the instrument is, in the first case, a promissory note negotiable by the law merchant, if payable to bearer or order, while in the second case it is not a promissory note negotiable by the law merchant, but is a specialty. So, a corporation can make a promissory note whereby it promises to pay to bearer or order a certain sum of money, at all events, at a certain time and place, and can sign the instrument by causing it to be signed by its president and treasurer, without affixing its corporate seal, and the instrument will bind it as its promissory note, as a simple contract, not a specialty, unless it be restrained by some provision of statute from contracting otherwise than under its corporate seal. But if to such an instrument its corporate seal be added, such seal is its seal, as the seal of the individual maker is his seal, and the like consequences follow. The instrument without the corporate seal will be a promissory note negotiable by the law merchant, and the instrument with the corporate seal will be a specialty and not a promissory note negotiable by the law merchant. If the capacity to make the instrument without as well as with the seal exists, it cannot, when made with the seal, be a promissory note negotiable by the law merchant.

It is not enough that the instrument be negotiable, but it must be a promissory note, and one negotiable, and one negotiable by the law merchant. The statute does not say a negotiable instrument, or a negotiable bond, or a negotiable chose in action. The prior statute (R. S. U. S., § 629) provided that no circuit court should "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." In the prior statute the thing out of which the exception is carved is a "suit to recover the contents of any promissory note or other chose in action." In the new statute the thing out of which the exception is carved is "a suit founded on contract." In the prior statute the exception is one "in cases of foreign bills of exchange." In the new statute the exception is one "in cases of promissory notes negotiable by the law merchant and bills of exchange." The general inhibition in the new statute is broader and more general than in the prior one, and the exception covers more ground in the new statute than in the prior one. But the statutory language in the exception cannot be extended by construction. It would have been easy to say negotiable instrument, or negotiable bond or other instrument, or negotiable chose in action, or instrument negotiable by the law merchant or otherwise. The argument on the part of the plaintiff is directed to showing that the instruments in question are negotiable, not that they are such instruments as the exception in the statute speaks of. It cannot be supposed that congress, in 1875, with the large experience which had been had at that time in the United States in bonds, obligations, certificates of indebtedness and promissory notes, under seal and not under seal, of municipal corporations and private corporations, did not understand and recognize, in making such exception, the distinction between a promissory note negotiable by the law merchant, as an instrument well known to law and to

commerce, and to be identified by that description, and other instruments which, though they had come, by statute or general usage or judicial decisions, to be regarded as in a certain sense negotiable, were not promissory notes negotiable by the law merchant. The obligations of municipalities payable to bearer have been placed by numerous decisions of the supreme court of the United States in the category of negotiable instruments transferable by delivery, so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them, but they do not thereby necessarily become negotiable instruments in the sense of the law merchant. *Wall v. County of Monroe*, 13 Otto, 74, 79. And even where they have such a *status* that, passing into the hands of a *bona fide* purchaser for value before maturity, they do so freed from any infirmity in their origin (*Cromwell v. County of Sac*, 6 Otto, 51, 57; BONDS, §§ 1467–71), they are not promissory notes negotiable by the law merchant in the sense of the statute under consideration. Such obligations payable to bearer are deemed payable to the holder, and so, under this act of 1875, the holder who sues is not regarded as an assignee of the contract, but is a holder through a transfer by delivery.

I am satisfied that, on the ground of want of jurisdiction, a verdict for the defendant Morgan ought to have been directed, and that for that reason a new trial must be granted.

WILLIAMS *v.* NOTTAWA.

(14 Otto, 209–213. 1881.)

ERROR to U. S. Circuit Court, Western District of Michigan.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This suit was brought by Williams, a citizen of Indiana, against the township of Nottawa, a municipal corporation of Michigan, to recover the amount alleged to be due on certain of its bonds, negotiable by the law merchant and payable to Samuel Kline or bearer. A trial was had by a jury, which resulted in a verdict, by the direction of the court, in favor of Williams for six of the bonds, and in favor of the township for the remainder. This writ of error has been brought by Williams to reverse the judgment against him; and, as the court directed the verdict which was rendered, the whole of the evidence has been embodied in the bill of exceptions, and is properly before us for consideration.

From the testimony of Williams himself, it distinctly appears he was personally the owner of only three of the bonds sued on of \$100 each. One Bracey Tobey was the owner of three others of the same amount. The judgment in favor of Williams was upon these six bonds, and for \$994.57, only. All the other bonds, being those on which the judgment was rendered in favor of the township, were owned by Samuel Kline and William Connor, both of whom were residents of the township and citizens of Michigan when the bonds were issued. There is no evidence of any change of citizenship by Kline since the bonds were delivered, and Connor, who was a witness at the trial, testified that he continued to be a citizen of Michigan. The bonds were transferred by Kline and Connor to Williams simply for the purpose of collection with his own. The same is true of those belonging to Tobey, but there is nothing in the evidence to show of what state he was a citizen, though he testified that he bought his bond in Michigan.

§ 1217. *Under the act of March 3, 1875, suits brought in a federal court by collusion to give jurisdiction will be dismissed.*

By section 11 of the judiciary act of September 24, 1789, chapter 20 (1 Stat., 78), it was expressly provided that the district and circuit courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." By section 1 of the act of March 3, 1875, chapter 137 (18 Stat., pt. 3, p. 470), this provision was so far modified as to extend the exception to "promissory notes negotiable by the law merchant and bills of exchange," but in section 5 it was expressly enacted "that if in any suit commenced in a circuit court . . . it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable . . . under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, . . . and shall make such order as to costs as shall be just."

This case, so far as the bonds owned by Kline and Connor are concerned, comes clearly within this prohibition. As the actual owners of the bonds were citizens of Michigan, they could not sue in the courts of the United States, and Williams distinctly testifies that he received and held their bonds solely for the purpose of collection with his own, and for their account. It cannot for a moment be doubted that this was done "for the purpose of creating a case" for Kline and Connor cognizable in the courts of the United States. That being so, it was the duty of the circuit court to dismiss the suit as to these bonds, and proceed no further; for as to them the controversy was clearly between citizens of the same state, Kline and Connor being the real plaintiffs. The transfer to Williams was colorable only, and never intended to change the ownership. This both Williams and Kline and Connor knew.

§ 1218. *It is the duty of the court to act of its own motion, whenever the collusion appears.*

Under the act of 1789, it was held in *Smith v. Kernochen*, 7 How., 198, that this objection was one which could only be taken by plea in abatement; but in *Barney v. Baltimore*, 6 Wall., 280 (§§ 1221-25, *infra*), there was no such plea, and the bill was dismissed in this court without prejudice, because it appeared in evidence that certain conveyances, by means of which the citizenship of the parties was changed so as to give the courts of the United States jurisdiction, did not transfer the real interest of the grantors. But whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for, as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney v. Baltimore*, *supra*, such transfers for such purposes are frauds upon the court, and nothing more.

It is clearly shown, also, that Williams and Tobey were collusively joined as plaintiffs to create a case cognizable in the circuit court; for when the suit was begun the amount due them respectively was less than \$500. Neither one of them could then have sued alone in the courts of the United States, because the value of the matter in dispute was not sufficient.

Since the judgment below was rendered, the amount due Williams and Tobey respectively has, by reason of the accumulation of interest, exceeded \$500. The citizenship of Tobey is not disclosed by the record. Whether he can sue in the courts of the United States we do not know. Williams can sue at this time if he still continues to be a citizen of some state other than Michigan, but without a false averment in his pleadings he could not have done so when this suit was begun. If he had in his pleadings falsely overstated the amount of his claim, he could not, when his judgment was obtained, have recovered costs, and at the discretion of the court might have been adjudged to pay costs. *Gordon v. Longest*, 16 Pet., 97. He was as much guilty of collusion as the other parties, and is no more entitled to consideration here than they are.

Inasmuch, therefore, as it was the duty of the circuit court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to stop all further proceedings and dismiss the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that court, leaving the parties in interest to such remedies as they may each be entitled to for the recovery of any amount that may be due them respectively on the bonds they severally own. In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases. If they improperly dismiss a cause their action in that behalf is expressly made reviewable here. Whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal or writ of error, we need not now decide. That would be a different case from this. Here the party guilty of the collusion asks relief from a judgment against himself. In such a case we deem it our duty to stop the suit just where it should have been stopped in the court below, and remit the parties to their original rights.

Judgment reversed.

M'DONALD v. SMALLEY.

(1 Peters, 620-625. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was instituted in the circuit court of the United States for the seventh circuit, and district of Ohio, to obtain a conveyance of a tract of land lying in what is termed “the military district,” claimed by the complainant under a patent younger than that under which it was held by the defendants. The complainant is a citizen of Alabama, and claims the land under a conveyance from Duncan M'Arthur, who is a citizen of Ohio. The defendants objected to the jurisdiction of the court; and after hearing the parties upon this point, the court dismissed the bill, being of opinion that its jurisdiction could not be sustained. From this decree the complainant has appealed, and the cause is now before this court on the question of jurisdiction.

§ 1219. *The fact that the plaintiff bought the property which is the subject of the suit, with the intention of bringing suit upon it in a federal court, does not defeat the jurisdiction of such court.*

The bill states the complainant to be a citizen and resident of the state of Alabama, and the defendants to be citizens and residents of the state of Ohio. It has not been alleged, and certainly cannot be alleged, that a citizen of one state, having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie; consequently, the single inquiry must be whether the conveyance from M'Arthur to M'Donald was real or fictitious? The transaction, as laid before the court, appears to be this: M'Arthur was apprehensive that his title could not be sustained in the courts of the state, in which alone he could sue; and, being indebted to M'Donald in the sum of \$1,100, offered to sell and convey to him the land in controversy, in payment of this debt. The letter in which this offer was made expresses the opinion that his title was good, and would most probably be established in the courts of the United States, but would fail in the courts of the state. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. He suggests that if M'Donald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbors who might be disposed to emigrate to Ohio, and offers to render any service in his power to the proprietor of the land in the prosecution of the claim in the courts of the United States.

The contract was concluded by a letter, written in answer to that which has been stated, of which the said M'Donald retained no copy. There was no special agreement between the plaintiff and M'Arthur when the deed was written, but perhaps some proposition by letter. He gave his bond to a third party for making a quitclaim title to the land, on condition of receiving from him \$1,100. This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff which was binding on both parties. M'Donald could not have maintained an action for his debt, nor M'Arthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states.

The only part of the testimony which can inspire doubt respecting its being an absolute sale is the admission that the plaintiff gave his bond to a third party for a quitclaim title to the land, on paying him \$1,100. We are not informed who this third party was, nor do we suppose it to be material. The title of M'Arthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist that it was for M'Arthur. The court cannot act upon this suspicion. But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face appears to be absolute, into a mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different states, it cannot be doubted that an ejectment or a bill to foreclose may be brought by the mortgagee, residing in a different state, in a court

of the United States. Why then may he not sustain a suit in the same court against any other person, being a citizen of the same state with the mortgagor. We can perceive no reason why he should not. The case depends, we think, on the question whether the transaction between M'Arthur and M'Donald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage.

§ 1220. *The equity rules prescribed by the supreme court should be observed by the circuit courts.*

A question has been made, whether the circuit court ought to have noticed the testimony on the conveyance under which the plaintiff claims, because it was brought irregularly before them. By a law of the state, interrogatories may be propounded by the defendant in his answer, which the plaintiff is compelled to answer as if they had been propounded in a cross-bill. Although this point has become unimportant in this cause, the court thinks it proper to say that the rules which govern the practice of the circuit courts in chancery have been prescribed by this court, and ought to be observed. We think there is error in the decree of the circuit court dismissing the complainant's bill, and that the same ought to be reversed, and the cause remanded for further proceedings according to law.

BARNEY v. BALTIMORE CITY.

(6 Wallace, 280-291. 1867.)

APPEAL from U. S. Circuit Court for Maryland.

STATEMENT OF FACTS.—Mary Barney, a citizen of Delaware, brought this suit in the United States circuit court against the city of Baltimore, for the purpose of obtaining a partition of real estate. She also joined as defendants certain citizens of Maryland, and three persons by the name of Ridgely, citizens of the District of Columbia. The bill was dismissed as to the Ridgelys, and an amended bill was filed, in which it was stated that the interest of the said Ridgelys had been conveyed to one S. C. Ridgely, a citizen of Maryland, it being admitted that the conveyance was made for the purpose of maintaining the jurisdiction. S. C. Ridgely died, and the property, by his will, revested in the three Ridgelys. A conveyance, having the same object in view, was then made to one Proud.

Opinion by MR. JUSTICE MILLER.

The first question which the record before us presents is, whether the circuit court of the district of Maryland, sitting as a court of chancery, could entertain jurisdiction of the case. The difficulty arises in reference to the interest of William, Ann and Matilda Ridgely, in the subject-matter of the litigation, and resolves itself into two distinct inquiries, namely: 1. Can a court of chancery render a decree upon a bill of this character without having before it, as parties to the suit, some person capable of representing their interest? 2. And secondly, if it cannot, did the contrivance resorted to, of conveying to S. C. Ridgely and Proud, taken in connection with the admitted facts on that subject, enable the court to take jurisdiction of the case?

§ 1221. *The three classes of parties to suits in equity.*

The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper

parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.

This class cannot be better described than in the language of this court, in *Shields v. Barrow*, 17 How., 130, in which a very able and satisfactory discussion of the whole subject is had. They are there said to be "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

This language aptly describes the character of the interest of the Ridgelys in the land of which partition is sought in this suit, and in the account which is asked for, of rents and profits. If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked to the other parties. If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties. The same observations apply to any account stated by the court, of rents and profits, and to any decree settling the amount due on that score.

§ 1222. *The act of February 28, 1839, does not give jurisdiction to the court in the absence of an indispensable party.*

Nor does the act of February 28, 1839, relieve the case of the difficulty. That act has been frequently construed in this court, and perhaps never more pertinently to the matter in hand than in the case already cited of *Shields v. Barrow*. The court there says, in relation to this act, that "it does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction, and so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established by the cases of *Cameron v. McRoberts*, 3 Wheat., 591; *Osborn v. The Bank of the United States*, 9 id., 738 (Const., §§ 2363-87), and *Harding v. Handy*, 11 id., 132. . . . The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court in *Mallow v. Hinde*, 12 id., 198, when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court;' so

that while this act removed any difficulty as to jurisdiction between *competent* parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. . . . It remains true, notwithstanding the act of congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit, without affecting those rights." See, also, *Northern Ind. R. Co. v. Michigan Central R. Co.*, 15 How., 233.

These views do not render the act of 1839 either useless or ineffectual; for while it is true that in reference to parties in chancery proceedings, that act only pronounced the rule which this court had previously asserted, its beneficial influence in cases of common law cognizance are often called into exercise. It is a rule of the common law, that where one of several joint obligors in a contract, whether verbal or in writing, is sued alone, he can plead the non-joinder of the other obligors in abatement, and in cases where the joint obligors not sued were citizens of the same state with the plaintiff, or were residents of some other district than that where the suit was brought, the jurisdiction of the court was defeated. This very serious difficulty was remedied by the act of 1839; for in such cases the plaintiff can now prosecute his suit to judgment against any one of such joint obligors, in any district where he may be found. Of this class of cases are *Inbusch v. Farwell*, 1 Black, 566, and others which preceded it.

But this rule does not conflict with that under which the courts of chancery act in refusing to make a decree, where, by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interest of the absent parties. In the class of cases just mentioned at common law, the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to that debtor, because he is only made to perform an obligation which he was legally bound to perform before. The absent joint obligors are not injured, because their rights are in no sense affected, and they remain liable to contribution to their co-obligor who may pay the judgment by suit, as they would have been had he paid it without suit. We are, therefore, of opinion that the circuit court could render no decree on the merits of this case, without having rightfully before it some person representing the interest of the Ridgelys.

§ 1223. *A citizen of the District of Columbia cannot sue in the circuit court as a citizen of a state.*

This leads us to the second inquiry connected with the jurisdiction of the case, namely, whether the conveyances to Proud and S. C. Ridgely, who were citizens of Maryland, and were made defendants, removed the difficulty growing out of the residence of the Ridgelys in the District of Columbia. In the case of *Hepburn v. Ellzey*, 2 Cranch, 445 (§ 901, *supra*), it was decided by this court, speaking through Marshall, C. J., that a citizen of the District of Columbia was not a citizen of a state within the meaning of the judiciary act, and could not sue in a federal court. The same principle was asserted in reference to a citizen of a territory, in the case of *New Orleans v. Winter*, 1 Wheat., 91 (§ 900, *supra*), and it was there held to defeat the jurisdiction, although the citizen of the territory of Mississippi was joined with a person

who, if suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts, when the point has arisen. *Wescott v. Fairfield*, Pet. C. C., 45. Indeed, the counsel for complainant seem to have conceded that the Ridgelys of the District could not become parties by their voluntary submission, and that their being parties deprived the court of jurisdiction, because they were dismissed from the suit after they had appeared and answered to the merits.

§ 1224. *An actual transfer of interest to give a federal court jurisdiction will give such jurisdiction; a colorable transfer will not.*

If the conveyance by the Ridgelys of the District to S. C. Ridgely of Maryland had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. *McDonald v. Smalley*, 1 Pet., 620 (§§ 1219–20, *supra*), and several cases since, have well established this rule. But in point of fact that conveyance did not transfer the real interest of the grantors. It was made without consideration, and with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the court. And it is now equally well settled that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more. In the case of *Smith v. Kernochen*, 7 How., 216, this court said: "The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then, in fact, a controversy between the former and the defendants, notwithstanding the conveyance." And the court cites *McDonald v. Smalley*, already mentioned; *Maxfield v. Levy*, 4 Dal., 330; *Hurst's Lessee v. McNeil*, 1 Wash., 70; and *Briggs v. French*, 2 Sumn., 257. It is not possible to see how the case before us can be taken out of the principle here laid down. We are therefore of opinion that the circuit court had no jurisdiction of the case.

It follows that the decree of that court, which, on its face, appears to be a dismissal of the bill on the merits, must be reversed, and the case remanded, with directions to that court to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to plaintiff's right to bring any suit she may be advised in the proper court.

Dissenting opinion by MR. JUSTICE CLIFFORD.

Unable to concur in the opinion of the court, I will proceed to state very briefly the reasons of my dissent.

Consent, I agree, cannot give jurisdiction in a case where it is not conferred by the constitution and the laws of congress, but the judicial power as described in the constitution extends in express terms to controversies between citizens of different states. Article 3, section 2. By the eleventh section of the judiciary act it is also provided that the circuit courts shall have exclusive cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the suit is between a citizen of the state where the suit is brought and a citizen of another state. 1 Stat. at Large, 78. Complainant is a citizen of Delaware, and the respondents are citizens of

Maryland, which brings the case within the express words of the judiciary act and of the constitution.

§ 1225. *Non-joinder of parties; effect on jurisdiction.*

Express decision of this court in *Hagan v. Walker*, 14 How., 36, is that since the act of the 28th of February, 1839, it does not defeat the jurisdiction of the court in a suit in equity, that a person named as defendant is not an inhabitant of or found within the district where the suit is brought. 5 Stat. at Large, 321. The court may still adjudicate between the parties who are properly before it, and the rule is that the absent parties are not to be concluded or affected by the decree. Cases may arise, say the court, in which the court cannot adjudicate between the parties who are regularly before it, for the reason that it cannot bind those who are absent, as where relief cannot be given without taking an account between an absent party and one before the court. Defect of parties in such a case does not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant.

Non-joinder of an absent party in such a case not only does not defeat the jurisdiction of the court, but it does not raise any such question under the constitution and the law of congress, because the parties before the court being citizens of different states the jurisdiction of the court is undeniable. Relief will not be granted in such a case where it appears that the interests of absent parties will be injuriously affected; but the question is not one whether a federal court has jurisdiction to hear and determine the cause. On the contrary, it is a question of equity practice as to parties, common to all courts exercising equity powers.

Such an objection is never allowed to prevail if the court can protect the interest of the absent party, or where it appears in the record that due notice was given to him, and that he has formally waived the objection. The maxim *volenti non fit injuria* applies in such a case, and consequently the difficulty may be remedied by a conveyance or stipulation appearing in the record. Courts of equity refuse to grant relief in such cases, not because they have not jurisdiction, but only because the right of absent parties interested in the subject-matter may be injuriously affected. Hence the rule is that, if the court can grant relief without affecting such rights, or can protect those rights in the decree, the court will not dismiss the suit; and the same rule is applicable if it appears in the record that the absent parties have full knowledge of the controversy and that they have in due form of law waived all objections to the prosecution of the suit. Unless these views are correct, then it is clear that the act of the 28th of February, 1839, is unconstitutional and void, as no one will pretend that congress can extend the jurisdiction of the federal courts beyond the power conferred in the constitution. Validity of that act of congress is admitted in the opinion of the majority of the court, and it is also admitted that the decision of this court in the case of *Inbusch v. Farwell*, 1 Black, 571, is correct. Direct decision in that case was, that the jurisdiction of the federal courts in a common law suit is not defeated by the suggestion that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court.

Under the constitution and the judiciary act the conditions of jurisdiction are the same in a suit in equity as at common law, and it is not possible to distinguish the one from the other without adding language to those provisions which neither the framers of the constitution nor congress ever employed.

For these reasons I am of the opinion that the circuit court had jurisdiction of the case, but the majority of the court are of a different opinion, which renders it unnecessary to enter upon the consideration of the merits.

CHASE, C. J., and FIELD, J., dissented.

HAYDEN v. MANNING.

(16 Otto, 586-589. 1882.)

APPEAL from U. S. Circuit Court, District of Oregon.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is a case which the circuit court should have dismissed, under the fifth section of the act of March 3, 1875, ch. 137, concerning the jurisdiction of the circuit courts of the United States, instead of granting the relief for which the complainant prayed. It is charged in the bill that Hayden, the appellant, while acting as the attorney of Rachel Dove and Bethuel Dove, her husband, purchased under execution a valuable tract of land belonging to her, and that he had defended the suit for the foreclosure of a mortgage, in which a decree was rendered under which the property was sold. It is set out with sufficient fullness that at this sale he bought the land at less than its value, under circumstances which should subject the title which he acquired to the character of a trust for the benefit of Mrs. Dove.

It is not necessary now to inquire into the truth of that allegation, on which the circuit court rendered a decree in favor of Manning, the complainant in the suit, because we are of opinion that he had no such interest in the matter as to enable him to sustain a suit in the circuit court of the United States in regard to it. The sale to Hayden was made March 5, 1864, and he received the sheriff's deed April 26th, thereafter. On the 7th of April, 1875, Rachel and Bethuel Dove conveyed the land to Manning, who brought the present suit May 12, 1876.

§ 1226. *Circumstances under which it appears that a collusive transfer of title was made to give jurisdiction to a United States court. In such case it was the duty of the court to dismiss the bill.*

It appears in evidence that, not long after the sheriff's deed was made to him, Hayden took possession of the land, and has retained it ever since, though it is said he obtained the possession unfairly. In April, 1874, Rachel Dove began a suit in the state court of Polk county, where the land was situated, against Hayden to recover these premises, and the court decided against her on demurrer. From this decision she took an appeal to the supreme court. She subsequently dismissed it, and also her suit in the court of original jurisdiction. While the latter was pending, and in April, 1875, the conveyance of the land in question was made to Manning. Manning was the husband of her daughter, and, as he resided in California, he had the citizenship necessary to enable him to renew the litigation in the circuit court of the United States.

The deed purports to be one of bargain and sale for the consideration of \$5,000; but no money was ever paid on it. No note or other obligation was given, nor any mortgage as security for the debt. It does not appear that Manning ever promised to pay anything for it. Mrs. Dove's account of the transaction is this: "My daughter Elizabeth is the wife of Charles Manning, the plaintiff. Manning never has paid me any money on this land, but he was

going to. He never gave me his note. I can't say when I saw Manning last. I think eight years ago. Manning wrote first about having the land conveyed to him; said he would take the matter off our hands. I have not the letter with me." Dove says that neither from his own knowledge nor that of his wife is he able to state whether any part of the \$5,000 has been paid. Manning's deposition was not taken, nor is any word, verbal or in writing, produced as coming from him in regard to this suit. The bill, which is filed in his name, is neither signed nor sworn to by him. Dove swears that he is the agent and attorney in fact of Manning, and as such he verifies the bill.

The defendant, who is called upon to make full and perfect answer, does so under oath, and denies that Manning was in good faith the lawful owner of the land. No bond for costs was given by Manning, or any one for him. Dove, in swearing to the bill of costs of about \$300, does not say that plaintiff had paid any part of them, but that they were incurred in the suit. There is no evidence that the deed from Dove and wife to Manning was ever delivered to him, or was ever in his possession; and there is no reason to suppose it ever left Oregon, or that he had been in Oregon for years before or after its execution.

Undoubtedly Mrs. Dove and her husband could have given their interest in the property to their daughter, and a conveyance in consideration of natural love and affection might have been good. But this deed was not made to her, nor on any such consideration, but recites a consideration of \$5,000 in money, while it clearly appears that no money was paid, or secured by note or mortgage, or promised or intended to be paid. "Manning wrote to me," says Mrs. Dove, "about having the land conveyed to him; said he would take the matter off our hands." What matter? Manifestly the litigation at that time going on. "I will sue for you in my name. I can go into a court of the United States, where you can't go," is what he meant.

There is not a syllable in this record inconsistent with the idea that the deed was made to Manning without his knowledge, recorded in Oregon, and delivered to the lawyers who brought this suit (the same who brought the suit in the state court), without his authority, and without any communication from him whatever. If the bringing of this suit was a tort, there is no evidence in the record by which Manning could be connected with it, or with any assertion of claim under the deed. It seems to us that Manning's name is used because he is a citizen of a different state from the defendant, for the sole benefit of Mrs. Dove; that he has no real interest in the controversy, and, if cognizant of what is going on, of which there is much doubt, that he is passively permitting the use of his name for her benefit, in order to make a simulated case of jurisdiction in the federal court.

This is precisely the case provided for in the act of 1875. The "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court," because the real controversy is wholly between citizens of the same state. "The name of Manning, the plaintiff in the suit, has been improperly and collusively used (in the language of this statute), for the purpose of creating a case cognizable under it." *Williams v. Nottawa*, 104 U. S., 209 (§§ 1217-18, *supra*); *Hawes v. Oakland*, *id.*, 450; *Detroit v. Dean*, 16 Otto, 537.

Decree reversed and cause remanded, with directions to dismiss the bill for want of jurisdiction, and without prejudice to any other action in a proper court.

WELLES v. NEWBURY.

(Circuit Court for Michigan: 4 McLean, 226-230. 1847.)

Opinion by WILKINS, J.

STATEMENT OF FACTS.—This case was tried at the last term and a verdict rendered for the defendant. The action was brought against him as one of the indorsers of a certain promissory note, made by one George L. Whitney, at Detroit, January 21, 1839, for the sum of \$3,500, payable ninety days after date. The principal witness for the plaintiff was Mr. John A. Welles, who proved the making of the note, the handwriting of the defendant as indorser, its negotiation and discount at the Farmers' & Mechanics' Bank of Michigan, at the time of its date, of which banking institution the witness was then the cashier, the protest of the note at maturity for non-payment, and the regular notice to the indorsers.

On cross-examination Mr. Welles further testified, in substance, as follows: "The Farmers' & Mechanics' Bank continued the owners of the note until the 10th of March, 1845, when it was assigned by deed under seal with other notes and assets of the bank to the plaintiff, as collateral security for a loan of money made to the bank by him and other stockholders, one of whom was a citizen of this state. The nominal consideration in the deed of assignment was \$1,200. Under its provisions the proceeds, as collected, were to be applied by the plaintiff, as assignee, in payment of the loan to the bank; after the liquidation of which, by the means thus provided or otherwise, this note, with others, if uncollected, was to revert to the bank. The note never was out of the possession of the bank—was never actually delivered to the plaintiff—and was transferred expressly with the view of bringing this suit in the court of the United States. The plaintiff was not here at the time of the execution of the assignment, and never had been here before. His first visit to this place was in the summer of 1845, subsequent to the assignment, and neither he nor any other person ever paid anything for the note. He was not aware that the plaintiff knew anything about the transaction at the time, or that this particular note had been assigned to him. The bank had a general arrangement with certain of the stockholders, who had made pecuniary advances for its relief, to transfer to them as collateral security certain notes, but the original object in the assignment of this note to the plaintiff without his knowledge was to enable suit to be brought in the circuit court of the United States, and thereby avoid the decision of the state courts in relation to proof of notice. Subsequently, in the month of June, the plaintiff ratified the assignment, and accepted this note as collateral security for his advances, but the note itself never was delivered to him, and never passed out of the actual custody of the bank until delivered by the witness to Mr. Abbot, the attorney of the bank, to bring this suit. The arrangement with the other indorser was made and completed anterior to the assignment to the plaintiff."

The note was delivered to the attorney without explanation, as the note of the plaintiff, and at the time the bank was indebted to him beyond the amount of the note. Such is the substance of the testimony of Mr. Welles, the witness of the plaintiff, and for a long time the cashier of the Farmers' & Mechanics' Bank of Michigan, a banking institution chartered by this state and located and doing business in the city of Detroit.

On the question presented by this testimony the court, among other matters, instructed the jury that "if they believed that the note was transferred only

as collateral security, to secure a prior debt of the bank to the plaintiff, to be accounted for and restored to the bank in case such debt was otherwise discharged, and for the purpose of suing in the United States court, the note still remaining the property and in possession of the bank, then such assignment did not absolutely vest the ownership of the note in the plaintiff."

The new trial is asked on the ground of the insufficiency of the testimony, and error in the charge of the court; but argued mainly on the last point.

§ 1227. *A merely colorable assignment of a note to a citizen of another state to give jurisdiction to the circuit court will not vest title in the transferee, nor give the jurisdiction.*

It is clear that the bank was the real holder of the note, from the period of its negotiation, down to the institution of the suit in this court. The assignment to the plaintiff, under the circumstances, with the sole object of bringing the suit in this court, did not divest the bank of its property, or make the plaintiff the real holder. He was merely the agent of the bank, with authority to collect, and bound to account for the proceeds; and if uncollected, to restore the note to the principal. In fact, the suit was instituted and prosecuted for the sole benefit of and under the direction of the bank, in the name of the plaintiff. It is true, the possession of a negotiable note is *prima facie* evidence of the party's being a holder for a valuable consideration, and he is not bound to prove, by other evidence, that he is a *bona fide* holder. But, if it is proved *aliunde* that he is but a mere agent, to give jurisdiction to this court, and holds and prosecutes the note as such, and with such object, he cannot recover a judgment upon it here in his own name. Such was the decision of Mr. Justice Story, in 5 Mason, 58, and who cited 10 John. R., 387, and 5 Mass., 491.

The point made in 5 Mason was, that the plaintiff was *not the owner of the notes* upon which the action was brought, but that they belonged to the Merchants' Bank at Newport, by which they had been originally discounted, and that they had been delivered to the plaintiff for the purpose of enabling suit to be brought upon them in the circuit court of the United States. The evidence here was much stronger against the plaintiff's recovery, for this note was never actually delivered to him, nor was he privy to the deed of assignment at the time of its execution, his name being used without his assent at the time, and the assignment was made to him as a citizen of a foreign jurisdiction, having an interest in the bank, for the sole purpose of enabling the bank to bring suit in this court.

Apart from his interest in the bank as a stockholder, the plaintiff had no substantial interest in the note. The jury found the facts that the plaintiff was to account to the bank for the note as agent, and to restore it, if not collected, and that the note still remained the property of the bank, and that the action was prosecuted for the benefit of the bank. Such being the case, he could not maintain an action as the indorsee of the note against the defendant in this court. But the plaintiff's title to the note, if any he had, was not derived from the contract of indorsement. He did not receive it as negotiable paper, in the course of trade. The note was past due at the time of the transfer; many years previous to the assignment the note had matured, and had been protested for non-payment. His title, therefore, was conferred by the deed of assignment, which circumstance alone was sufficient to defeat his action in this court. Motion for a new trial refused.

STARLING v. HAWKS.

(Circuit Court for Ohio: 5 McLean, 318-322. 1851.)

Opinion by the COURT.

STATEMENT OF FACTS.—A motion is made to dismiss this cause for want of jurisdiction, on the ground that the land claimed was conveyed to the lessor of the plaintiff by Sullivant, to give jurisdiction to this court to prosecute a suit for the benefit of the grantor. Mr. Backus stated, as counsel, which was admitted by the other party, that there were many cases involving the title to land to a large amount, pending in Champaign county. That from the trial of one of them he, as counsel, became convinced, from the local interest felt, and consequent influence on the juries, a fair trial could not be had in that county; and that he advised the conveyance made by Mr. Starling to the lessor of the plaintiff, for the consideration of \$20,000, in order that suits might be prosecuted to settle the title at the expense of the grantor. And it was agreed that if, at the end of five years, the grantee should prefer, he had the privilege to reconvey the land; that if sales could be made, the proceeds should be paid over to the grantor, in payment for the lands. And that Sullivant executed deeds of general warranty for the lands sold.

The following correspondence took place in making the arrangement: In a letter dated 5th of August, 1848, after complaining of the influence brought to bear on the jury, on one of the trials for a part of the land, which caused a verdict against Sullivant, Mr. Backus states, "Sullivant and myself now propose to sell the tracts to you. Our title you are acquainted with, and as to the value of the land you are as able to judge as we. It has been estimated at various amounts from ten to sixty thousand dollars. We will sell it to you for \$20,000, payable in five years, with interest, upon the condition, that is, if, at the expiration of five years, you should make default in the payment of the purchase money, the land shall be reconveyed and your note given up. In other words, the condition shall not operate as a mortgage in favor of either party; and if, at the end of the time, you should not choose, or it should be inconvenient, to make the payment and take the land, we cannot compel you to do so. But upon reconveyance we shall be compelled to release you from the payment of the purchase money. We, on the other side, should you be allowed to force us to look to a sale of the land for the purchase money, or to yourself upon your note, being as you are a citizen of New York, you would be more favorably situated, so far as regards litigation, than we, because you can bring your suits in the United States courts, and be beyond the local prejudice and feelings of the people of the county where the land lies."

Another letter was dated 22d August, 1848, in which Mr. Starling says: "I am pleased with your proposition to sell me the Lee lands in Champaign, and I accept your proposition without hesitation, and inclose you my note for the purchase money. The legal title is in William; let him execute the proper conveyances and deliver them to you. Do you place them on record, and prosecute the suits for the recovery diligently in the manner you shall deem conducive to my interest." On the 3d September, 1851, Mr. Starling writes: "I promptly accepted your offer to purchase the Lee lands upon the terms you proposed. I intended to have inclosed you a note for the purchase money, but believe I neglected to do it, and I now inclose it, dated August 22d, which is about the time I wrote to you." Under the above circumstances the conveyance was executed, and suits for the recovery of the lands were commenced.

§ 1228. *Property may be conveyed solely to give jurisdiction to the federal courts. But the conveyance must be in good faith, and not merely colorable.*

A conveyance of land may be made with the express view of giving jurisdiction to the courts of the United States, and if it be an absolute, *bona fide* conveyance, it is good. This is the right of every citizen. A person may change his citizenship for this purpose; and the motive with which the conveyance was executed, or the change of citizenship was made, though avowed, if both were done in good faith, constitutes no objection to the exercise of jurisdiction. In a conveyance of land for this purpose, the only question is, Is it an absolute conveyance, without condition that it shall inure to the benefit of the grantor? If it be colorable only, it is a fraud on the law, and jurisdiction in the federal court is not sustainable. The deed is absolute on its face. The condition, whether expressed in the deed or out of it, if inoperative as to a transfer of jurisdiction, would not destroy the validity of the deed, only for the purpose of giving jurisdiction to this court.

The contract stipulates that the agreement should not operate as a mortgage; but suppose a mortgage on the land had been given to secure the payment of the consideration. The conveyance would have been absolute, and the jurisdiction undoubted. But this is not the character of the conveyance. The grantor had the option to rescind the contract at the end of five years. He was not bound to do so, but it was a right secured to him. This shows the nature of the transaction, and the purpose for which it was entered into. In addition to this the suits were to be prosecuted at the expense of the grantor, which authorizes the inference that the suits were to be brought for his benefit. Starling was not obliged to take the land, but had the right to relinquish it, on which the grantor was bound to deliver up his obligation. This shows the conveyance was not intended to be absolute.

There is no immorality in this. It was simply a device and a contrivance to change the jurisdiction with a view of obtaining a trial free from local prejudices. This, indeed, is a laudable motive, and there can be no objection to it, except that the law, and the policy of the law, are against it. The case of *McDonald v. Smalley*, 1 Pet., 623 (§§ 1219–20, *supra*), was different from this in several important particulars. The title was absolute upon its face, and an adequate consideration was expressed in the deed. There was no condition for a reconveyance, no promise to aid in the prosecution of the suit, nor that the grantor would pay the expense. Upon the whole, we are satisfied, from the facts of this case, that the conveyance was colorable only, and with the view to give jurisdiction to this court; the suit is, therefore, dismissed.

MARION v. ELLIS.

(Circuit Court for Louisiana: 10 Federal Reporter, 410–412. 1882.)

Opinion by PARDEE, J.

STATEMENT OF FACTS.—When this cause was lately before the court, (a) it was decided that “the demurrers herein filed will be sustained except so far as the issue of Marion’s ownership is concerned, and that will leave the petition or cross-bill substantially a plea to the jurisdiction, on the ground that Marion

(a) A cross-bill filed by the defendant in a suit on a mortgage note in the circuit court of the United States, which is substantially a plea to the jurisdiction, and which alleges that the assignment of the note to the plaintiff was made collusively for the purpose of giving the court jurisdiction, the real owner being a citizen of the same state with the defendant, presents an issue under the sixth section of the act of 1875, and a demurrer to it cannot be sustained. *Marvin v. Ellis*,* 9 Fed. R., 367.

has been collusively made a party in order to give the court jurisdiction." On this plea to the jurisdiction evidence has been taken and the parties have been heard. The evidence shows that the firm of Grobel & Co., being the holders of the mortgage notes in controversy, pledged them to plaintiff, Marion, to secure the sum of \$250 borrowed money; that the object of Grobel & Co. was to transfer the notes to such a holder as could institute foreclosure proceedings in the United States court; that plaintiff, Marion, loaned the money to Grobel & Co., and took the notes in pledge, without any knowledge of the object of Grobel & Co.; that he only learned the object after the transaction was completed. On this showing the matter is submitted to the court, and the question is whether the transaction is a pure simulation or a veritable contract.

§ 1229. *Where a note is transferred to a citizen of a different state in order to give jurisdiction to the federal court, and the assignee takes in good faith and without knowledge of the object, the court will have jurisdiction.*

There seems to be no doubt that, as between Marion and Grobel & Co., the arrangement is a binding contract. Marion paid the money over, and has not been repaid. He took the notes in pledge, as he had a right to do. He had no knowledge of the object of Grobel & Co., even if that object would affect the transaction. This conclusion decides the plea adversely, for there can be no doubt that if plaintiff became the pledgee of the notes in good faith, he would have undoubted right to bring suit for foreclosure. See *Armstrongs v. Baldwin*, 13 La., 566; *Garrish v. Hyman*, 29 La. Ann., 28; and see *Giovanovich v. Citizens' Bank*, 26 La. Ann., 15. The citizenship of the parties would give the court jurisdiction.

The case of *Lawrence v. Holmes*, decided at the last term, was a case of simulation; in other words, "there was no actual transfer of the account sued on. The transfer alleged was a pretense." But it is urged that the friendly relations shown to exist between Marion and Grobel & Co., and the large amount of notes—over \$3,000—given in pledge between friends to secure so small a loan—\$250—evidences that the transaction, although a contract, was one made to give the court jurisdiction, and it is argued that this is a fraud on the court. Concede that the contract of transfer was made by both parties with a view to enable suit to be instituted in this court, and still the plea must fail under the rules laid down in numerous adjudicated cases.

In the case of *De Laveaga v. Williams*, (a) 5 Saw., 573, Mr. Justice Field said: "There is no doubt that the sole object of the deed to the complainant was to give this court jurisdiction, and that the grantor has borne, and still bears, the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he chooses to do so. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor to part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of congress to proceed in the federal courts for the protection of his rights. It is only when the conveyance is executed to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud on the court." See, also, *Briggs v. French*, 2 Sumn., 256; *Smith v. Kernochen*, 7 How., 215; *Barney v. Baltimore*, 6 Wall., 288 (§§ 1221–25, *supra*).

(a) Overruled in *Coffin v. Haggin*, 7 Saw., 509 (§ 1230, *infra*).

Counsel, by brief, attempt to raise the question that Grobel & Co., being themselves the pledgees of the notes against defendant, had no right to repledge them to plaintiff. To this it may be answered: (1) That is no issue now in the case; (2) the defendant can raise no such issue, it being no concern of his; (3) that so far as it was in this case it has been settled by the ruling on the demurrers lately decided. The complainant must have judgment on this plea to the jurisdiction. And as the balance of the defendant's petition or cross-bill has been held bad on demurrer, there is nothing left in the case to sustain the outstanding injunction to restrain the sale originally ordered in the premises. Judgment may therefore be also entered dissolving the injunction heretofore issued in this case, with costs, and reserving to complainant his right to proceed on the injunction bond for all damage incurred by reason of said injunction. Let a decree in accordance herewith be entered.

COFFIN v. HAGGIN.

(Circuit Court for California: 7 Sawyer, 509-516. 1882.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—On April 15, 1880, one Bonestell conveyed to the complainant, Coffin, a citizen and resident of New York city and state, one thousand nine hundred and twenty acres of land, worth, according to his estimate, about \$20,000 — the expressed consideration being \$10; but no consideration was in fact paid. The deed was *not recorded*. On the same day Mr. Stebbins also conveyed one thousand two hundred and eighty acres in the same vicinity to the same party, costing and worth about \$10 per acre, including some \$6 per acre expended for procuring water for irrigating — the expressed consideration in this deed being \$10, but nothing being in fact paid. Neither Bonestell nor Stebbins knew Coffin, or ever saw him, or had any communication with him upon this or any other subject, and at the date of the conveyances, so far as Bonestell and Stebbins are aware, Coffin knew nothing either of the conveyances or the intention to convey to him. On April 25th, ten days afterwards, and before sufficient time had elapsed to exchange communications by mail, this bill was filed to enjoin the diversion of the waters of Kern river from its channel, which ran through the lands conveyed. The bill alleges the ownership of the land by Coffin, and that Coffin is a citizen of New York and the defendants citizens of California. The citizenship of the parties is the jurisdictional fact. The several defendants filed pleas to the jurisdiction, denying that Coffin is the *bona fide* owner of the land, but alleging that the land was conveyed to him by Bonestell and Stebbins, respectively, only colorably and collusively for the sole purpose of enabling them to bring the suit and litigate it for their own benefit in the name of Coffin in the United States courts; that they are still the real parties in interest and substantial owners of the land.

The testimony upon the issues raised by these pleas and the replications is mainly that of Bonestell and Stebbins. Neither Coffin nor the attorney who managed the transaction was examined. Bonestell testifies — and the testimony of Stebbins is substantially the same — that he never saw or knew Coffin; that he made the conveyance by the advice of Redington for the purpose of beginning this suit (Stebbins' testimony is by advice of counsel); that no consideration was paid; that there was no agreement to reconvey, but he did not know but that he might get it back; that he expected he was to get it

back some time, but not a word was said about getting it back; that it was said to him that an absolute deed was necessary without agreement to reconvey to give jurisdiction; that he was advised it was necessary to make an absolute transfer, and he made it; that the purpose was to bring this suit; that he hoped some time to get it back, but could not claim it; that he trusted entirely to Coffin's generosity, because it was considered one of those cases where it was necessary to make such a deed; that the attorney in the case, Mr. Stetson, told him that the deed was at the notary's, and he went there and executed it, and left it there to be called for; that he understood Mr. Coffin was in New York; that he never got the deed again, and don't know what became of it; that he intended it for Mr. Coffin because his name was in it, and there was no other person for it to go to. Mr. Stebbins testifies to a similar state of facts, and that, although there was no agreement to that effect, he hoped to get something: "I hope the suit, on account of which I gave this title, will result in establishing the title to the land. I gave the deed for that purpose, and if that purpose is accomplished, I hope to get something for what I have deeded away." He stated that in making the conveyance without any previous consultation with Coffin, a stranger to him, he relied on the honor usually found among men in their transactions with their fellows.

Mr. Redington, who verifies the bill as the attorney in fact of Coffin, says that he knows Coffin; has heard about these deeds, but does not remember having ever seen them; has never had any conversation with Coffin upon the subject of the land; did not suggest to the grantors the making of the deeds; had nothing to do with making the deeds; had no conversation about the deeds, but received a telegram from Coffin requesting him to sign, as his attorney in fact, the papers in Stetson & Houghton's hands, referring, as he supposed, to the bill in equity in this case, which he accordingly did sign; that he has held a power of attorney from Coffin for several years. From other testimony it seems that Coffin is a partner of Mr. Redington in a New York firm of which Redington is a member. Mr. Stetson, solicitor of complainant, produced the deeds on request of defendants' solicitors. A clerk in the office of Mr. Stetson testified that, by direction of Mr. Stetson, he mailed the deeds to Mr. Coffin, at New York, on April 15th, in a registered letter, and in due course of mail, about the 2d or 3d of May, got a postoffice receipt therefor. It does not appear what communication, if any, was made with the deeds, or what response, if any, to any communication was received from Mr. Coffin.

Whether the counsel under whose advice these highly important transactions were had made any arrangement with Coffin on behalf of the parties in interest not communicated to them, and if so, what arrangement or what communication was had between them upon the subject of the conveyances and suit, does not appear. Whatever occurred—and in view of the great importance of the steps taken, it is natural to suppose that something must have transpired—it is but fair to presume that what did take place between them would not strengthen the complainant's position, for it was important for him to make as strong a case on the pleas as possible. Had these facts been favorable to his view, as they were wholly under complainant's control, it is scarcely probable that he would have omitted to put them in evidence. The defendants themselves have been compelled to go into the camp of their opponents for all their evidence to sustain their pleas. It is not to be presumed, therefore, that the evidence to support the pleas has even a gloss in defendants' favor that the facts will not fully justify.

Thus, to state the facts in the strongest light in favor of the complainant, or complainants, as the case may be, whether nominal or real, I think it clearly appears from the evidence that the grantors, Bonestell and Stebbins, were desirous of bringing a suit in the United States courts to determine their rights to the waters of Kern river, and the United States courts not having jurisdiction over either the subject-matter or the parties, they set about devising some plan by which a case of jurisdiction could be made; that their counsel, Messrs. Stetson & Houghton, advised them that the object could be accomplished by making an absolute conveyance to a citizen of some other state; then bring and prosecute the suit in his name; but that in order not to defeat the jurisdiction, it would be necessary to avoid making any agreement for a reconveyance; that it would be necessary to rely upon the honor of the grantee to reconvey the land; that Mr. Coffin's name was suggested by some one, it does not clearly appear by whom, and accepted; that the deeds were prepared by the counsel, sent to a notary for execution, and the parties notified to go and execute them, which they did, and left the deeds to be handed to Mr. Stetson; and that they subsequently came to his possession; that he caused them to be sent to Mr. Coffin, and immediately upon their receipt, this being the first intimation, so far as appears, to Coffin of the making of these deeds, he, Coffin, telegraphed to Redington to sign, as his attorney in fact, the bill in equity prepared by Stetson, which he accordingly did, and the bill in this case was thereupon filed ten days after the date of the execution of the deeds; that Bonestell thus deeded voluntarily, without consideration, to an entire stranger whom he had never seen or known, and who had no interest whatever in the matter, property of the value of \$20,000, for the very purpose of making a case of jurisdiction in this court, taking special care not to communicate with him on the subject, and especial care that no one should make any assurance or intimation of any reconveyance; and Stebbins, in like manner and with like precautions, for the same express purpose, conveyed property of the value of more than \$12,000; that the sole purpose of the said grantors in making the conveyances was to prosecute their contemplated suit in the name of Coffin in the United States courts, but for their own benefit, relying upon Coffin's honor to reconvey at the termination of the litigation, or before, and expecting he would so reconvey; that Coffin, upon being informed of the execution of the deeds, co-operated in this plan by immediately authorizing by telegraph the proposed suit to be commenced in his name. What further he may do, of course remains for the future to disclose. He has got standing in his name, however, a large amount of property which was conveyed to him by entire strangers, without consideration and even without his knowledge, for the sole purpose of giving to the United States courts jurisdiction of a suit to be prosecuted in his name for their own benefit, and relying upon his honor as a man to reconvey to them on or before the accomplishment of their object. Immediately upon receiving the information as to what has taken place, he assents to the bringing of the suit, the papers in which were, doubtless, and must almost necessarily have been, already prepared, and then accepts the situation, and co-operates with his grantors in carrying out their purposes. He does not even await the slow process of communication by mail, but uses the telegraph to express his assent. He does not act of his own motion, but moves upon the suggestion of others to carry out their own purposes. He cannot repudiate the right or claim of his grantors to a reconveyance upon the accomplishment of their purpose, notwithstanding the fact that care was designedly and studiously taken

not to commit him by express promise without an act of *perfidy*. To refuse a reconveyance under the circumstances would be a breach of confidence, a breach of faith and trust between man and man of which no honest or honorable man would be guilty.

§ 1230. *Where property is conveyed to a citizen of another state without consideration, and suit brought in the name of that person concerning that property in a court of the United States, such conveyance is collusive and gives no jurisdiction, and the suit will be dismissed.*

There can be no possible doubt that this is in fact, whatever it may be in form and appearance, the suit of Bonestell and Stebbins, for their own use and benefit, and that the conveyance and prosecution of the suit in another's name are only colorable and collusive. It is no less so because the agreement and co-operation are tacit and not express. The fact that the conveyances were made by the grantors for their own purposes of bringing and prosecuting the suit without even the knowledge of the grantee, and that the grantee immediately, without delay or hesitation, carried out that special purpose upon receiving information of their act and design, shows an assent to their act, a co-operation in their purpose, and further shows that parties have been "collusively made for the purpose of creating a case cognizable . . . in the said circuit court," and "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," within the meaning of the provisions of section 5 of the act of 1875. The case of *De Laveaga v. Williams*, 5 Saw., 574, is relied on by complainant to sustain the jurisdiction in this case, and it is, I think, very apparent that the whole arrangement in this case was made and all the steps taken with especial reference to the rulings in that case—with a preconceived purpose to bring it within that decision. It is true that that suit was brought since the passage of the act of 1875; but it was considered and decided with reference to the decisions of the supreme court made upon prior acts of congress. I took part in the decision, and, although I thought the question not free from doubt, yet, upon the whole, I came to the conclusion that it was in accordance with the rulings of the supreme court as they then stood under the prior statutes. It was not suggested by counsel on the hearing, however, that the provisions of section 5 of the act of 1875 in any degree affected the question, nor did it occur to my mind, nor was the effect of that act considered by the court in deciding the case.

The decision of the supreme court at the present term in *Williams v. Town of Nottawa* (14 Otto, 209; §§ 1217–18, *supra*) shows that that act has an important bearing upon this question, which must now be considered. In that case the court, by the chief justice, says: "But whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under the act of 1875. In extending a long way the jurisdiction of the courts of the United States, congress was especially careful to *guard against the consequences of collusive transfers to make parties*, and made it the duty of the court, on its own motion, without waiting for the parties, *to stop all further proceedings and dismiss the suit the moment anything of the kind appeared*. This was for the protection of the court, as well as the parties, against fraud upon its jurisdiction; for, as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney v. Baltimore*, *supra*, 'such transfers for such purposes are frauds upon the court and nothing more.' . . . Inasmuch, therefore, as it was the duty of the circuit court, on its own

motion, as soon as the evidence was in, *and the collusive character of the case shown*, to have stopped all further proceedings and dismissed the suit, the judgment is reversed and the cause remanded, with instructions to dismiss the suit at the cost of the plaintiff in error, *because it did not really and substantially involve a dispute or controversy within the jurisdiction of the court.* . . . In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that *it is the duty of the circuit courts to exercise their power under it in proper cases.*" After a full consideration of the facts I am constrained to think that this is a case which the court, under the act of 1875, is required to dismiss on the ground that it is colorably and collusively brought in the name and with the acquiescence of a party who has really no substantial interest in the matter. I do not wish to be understood as imputing to the parties to this action, or their counsel, anything morally wrong. They are all men of high character. They only sought the jurisdiction of the national courts by means which, under former statutes, had the sanction of the highest authority.

I find the plea to be true, and that defendants are entitled to have the bill dismissed for want of jurisdiction; and it is so ordered.

GREENWALT v. TUCKER.

(Circuit Court for Missouri: 3 McCrary, 450-455; 10 Federal Reporter, 884-888. 1882.)

Opinion by TREAT, D. J.

STATEMENT OF FACTS.—This is an action of ejectment against three defendants, charging them with being in possession of the premises. There was a joint answer, in which there was no denial of the joint possession as averred; and hence the suggestion that the judgment for damages against all the defendants was erroneous has no foundation in law or in the pleadings, or in the facts agreed.

This case was heard on an agreed statement of facts, which has the force of a special verdict. The plaintiff contends that, therefore, nothing is open for consideration or review on this motion, except the conclusions of law upon such agreed statement. That point would be well taken if the motion embraced only what had heretofore been before the court, but it urges, supported by affidavits, that from facts brought to the knowledge of defendants since the trial, and which could not, by due diligence, have been previously ascertained, a fraud on the jurisdiction of the court had been perpetrated, in this, to wit: That the plaintiff had no interest in the controversy; that one Reinders, having the tax title in question, executed and acknowledged a deed in blank as to the grantee; that he left that paper with his attorney "for collection" (whatever that may mean); that said attorney filled the blank with the name of the non-resident plaintiff for the mere purpose of bringing suit in her name in the United States court, she not having paid any consideration therefor. The question involved is not free from the embarrassments arising from several decisions, mainly concerning the transfer of promissory notes, etc.

§ 1231. *Provisions in judiciary act of 1789, and in act of March 3, 1875, as to suits by assignees.*

Under the judiciary act (1789) the transfer of such notes, etc., even *bona fide* and for value, was subjected to a restriction, in order to avoid an attempt to draw into the federal courts the adjudication of questions therein which could be as well and ought to be determined in the state courts, in which and under

whose laws said contracts were made. Hence, that act denied to United States courts jurisdiction “of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.” Under that act there have been many decisions, which it is not necessary to review.

The act of 1875, which has in many respects enlarged the jurisdiction of United States courts to an almost indefinite extent, contains this provision: “Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court, to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange.”

The change in the language of the act of 1875, on the subject quoted, may be only another form of expressing, in the light of decisions, what had been held to be the true interpretation of the act of 1789. However that may be, the various acts of congress, and the better decisions thereunder, look to the preservation of the constitutional rights of citizens, to a judicial determination of their controversies in the federal courts, when fairly entitled thereto, and to a prevention of fraudulent or other contrivances, whereby the federal should supersede, or be substituted for, the more rightful jurisdiction of state courts.

§ 1232. *A formal transfer of property, without consideration, for the purpose of giving jurisdiction to the federal court, will not give such jurisdiction.*

There are several cases in which it is held that a *bona fide* transfer for value, although made for the purpose of giving jurisdiction to a federal court, should be held valid for jurisdictional purposes. Some of these cases are noted in *Marion v. Ellis*, 10 Fed. R., 410 (§ 1229, *supra*). If any of said cases have gone so far as to hold that a formal transfer, without consideration, [may be made] for the mere purpose of having a federal court obtain jurisdiction, this court cannot assent to such doctrine. None of those cases, however, rightly considered, can properly be held to advance such a rule. The ruling in this case does not cover cases of *bona fide* transfers for value. The rule as to promissory notes, etc., under the act of 1789, and as to contracts under the act of 1875, are especially suggestive as to actions in ejectment, wherein the rights of the parties are ordinarily dependent, if title is involved, upon local statutes. It is a familiar principle that on questions of title the federal courts follow the interpretation given to state statutes by the court of last resort in the state. Its interpretation becomes a rule of property, and may be considered conclusive, not as in cases under the law merchant. Why, then, should not the state courts decide what is peculiarly in their province, unless a non-resident, who, in good faith, has a case for adjudication, chooses to come into a federal court? Can a nominal grantee, who has no real interest in the controversy, and to whom the realty has been transferred only for the purpose of bringing, in his name, a suit in the federal court, escape the consequences of a plea in abatement, or of an issue in the nature of a plea in abatement, whereby it may be shown that he is not the real party in interest, and, further, that his formal relation to the controversy was solely to effect a fraud on the jurisdiction? Can it be that, under pretense of a constitutional right as to citizenship, such frauds can be successfully perpetrated? There is, and long has been, a statute of Missouri in the following words:

“Any conveyance of land made by a citizen or citizens of this state to a

citizen or citizens of any of the states or territories of the United States, without a valuable or *bona fide* consideration, and for the purpose of, or with the view of, giving jurisdiction to any of the courts of the United States, and thereby to harass the occupants thereof, shall be and the same conveyance is hereby declared inoperative," etc.

Of course, no state statute can deprive a citizen of any of his rights under the federal constitution and laws, and if the Missouri statute just quoted were the only authority on the question before this court, no special weight could be given thereto where real controversies exist between a citizen of Missouri and a citizen of another state. The statute in question, so far as quoted above, merely announces a recognized rule in the federal courts, and proceeds to affix consequences for the attempted fraud. With those consequences this court has in this case nothing to do. The sole question is whether the transfer by a blank deed, *mala fide*, without consideration, of the title to a parcel of land in Missouri, for the purpose of bringing suit in this court, will enable such a grantee to maintain an action of ejectment here? If such be permissible, then, despite constitutional and legal provisions and restrictions, nearly every controversy can, through fraudulent schemes, be absorbed in the federal vortex, to the great damage and possible ruin of the adverse party through extraordinary costs and expenses. A citizen of Missouri, resident on the Iowa border, or resident on the Arkansas border, the title to whose land his neighbor disputes, can have the cause tried in his county, where the witnesses reside and where the *locus in quo* is known, according to the state laws, which are controllable in every forum. Why, then, should he be dragged far away from his home to contest his rights at great expense in another forum, instead of having the controversy judicially determined where it can be properly and inexpensively investigated?

In the case now under consideration this court rules that the motion for a new trial should be granted, for the following reasons: (1) That since the trial new testimony has been discovered, which by due diligence could not have been previously obtained. (2) That the *prima facie* showing of the defendants is to the effect that a fraud on the jurisdiction of this court has been practiced. No court with jealous regard to its duties will permit itself to be an instrument of fraud. If the judgment in this case were sought to be impeached by summary or plenary proceedings, the court would be bound to take cognizance thereof. It is not necessary in all cases to bring a bill in equity to have a judgment set aside for fraud; but where the injured party proceeds promptly, as by a motion for a new trial or otherwise, the court will entertain the question, granting to the respective parties due opportunity to be heard. On the present motion the court must act from the evidence before it, which, if true, shows a fraudulent judgment. Motion sustained.

MCCRARY, C. J., concurs.

§ 1233. Bonds.—Bonds with the payee left blank, and regarded as negotiable in the state where issued, are considered such by the federal courts, and as if payable to bearer. A holder, citizen of New Hampshire, may sue a Massachusetts company issuing them, in the federal courts, though they were first issued to a Massachusetts citizen. *White v. Vermont & Mass. R. Co.*, 21 How., 577.

§ 1234. The circuit court of the United States, sitting in Massachusetts, has no jurisdiction of a suit against a Massachusetts corporation upon its bonds which are made payable to order and assigned to a citizen of New Hampshire, by whom the suit is brought. *White v. Vermont & Mass. R. Co.*,* 21 Law Rep., 469.

§§ 1235-1250. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1235. A bond with a special indorsement which makes it payable to bearer may be sued upon in the circuit court notwithstanding the provisions of the eleventh section of the judiciary act of 1789. *Bradley v. Williams*, 3 Hughes, 35.

§ 1236. Municipal bonds being negotiable by the law merchant, an assignee thereof may, under the act of March 3, 1875, maintain a suit upon them in the federal court, when his assignor is incompetent. *Rich v. Seneca Falls*,* 19 Blatch., 558.

§ 1237. Municipal bonds have all the qualities of negotiable paper, and come within the spirit at least of the exception, in the act of March 3, 1875, in favor of suits by assignees of promissory notes. *Halsey v. New Providence*,* 3 Fed. R., 364.

§ 1238. Bonds under the seal of a municipal corporation are specialties; the legal right to sue upon them is in the obligee, and the assignee of the latter cannot sue upon them in his own name. *Clark v. Janesville*, 1 Biss., 102.

§ 1239. Interest coupons.—The holder of a coupon payable to bearer is not an assignee in such a sense that, if a former holder could not have sued on it in a federal court, he also cannot. *Thompson v. Perrine*, 16 Otto, 592; S. C., 17 Blatch., 20; *Chickaming v. Carpenter*, 16 Otto, 666; *McCoy v. Washington County*, 3 Wall. Jr., 386. If he bought the coupons expressly for the purpose of suing in a federal court, and with the understanding that he should sue in that court and return part of the proceeds to the vendor, this fact does not prevent his suing in such court. *Perrine v. Thompson*, 17 Blatch., 20.

§ 1240. The act of March 3, 1875, which provides that no circuit court shall have cognizance of any suit on a contract in favor of an assignee, unless such suit could have been prosecuted in such court, if no assignment had been made, does not prevent the holder of a coupon payable to bearer from maintaining a suit in this court, although the party from whom he derived title could not have maintained an action himself, for he acquires title, not by assignment, but by delivery. *Cooper v. Town of Thompson*, 13 Blatch., 434.

§ 1241. Under section 11 of the judiciary act, no action can be maintained in the United States courts on a chose in action by its assignee, unless such suit could have been maintained if no assignment had been made. So held in *assumpsit* on the coupons of certain bonds issued by the city of Janesville to the Rock River Valley Union Railroad Company, and assigned to —, or bearer, to recover the interest due thereon. *Clark v. Janesville*, 4 Am. L. Reg., 591; 1 Biss., 100.

§ 1242. A promissory note payable to bearer is not within the prohibition of the eleventh section of the judiciary act of 1789, which prohibits suits by an assignee unless the suit could have been maintained in the federal courts if there had been no assignment. *Bullard v. Bell*, 1 Mason, 251; *Smith v. Clapp*,* 15 Pet., 125.

§ 1243. A holder of bank-notes payable to bearer is an original holder, and is not under the prohibition of the eleventh section of the judiciary act of 1789, chapter 20. *Wood v. Dummer*, 3 Mason, 313.

§ 1244. Suit may be brought in a federal court on a promissory note payable to bearer, without regard to whether former owners of the note could have sued in such court. *Halsted v. Lyon*, 2 McL., 228.

§ 1245. The circuit court has jurisdiction of a suit against a citizen of the state in which the court sits, by a citizen of another state, on a promissory note payable to bearer. *Varner v. West*,* 1 Woods, 494.

§ 1246. The *bona fide* holder for value of a note payable to bearer, secured by a mortgage, may, if he is a citizen of a different state from the promisor, sue him in the circuit court of the United States, although the payee, from whom the holder got the note, is a citizen of the same state as the promisor. The eleventh section of the judiciary act of 1789 does not apply. *Halsted v. Lyon*, 2 McL., 227.

§ 1247. Where a note is made payable to A. B., or bearer, the circuit court has jurisdiction to enforce payment in favor of a holder who is a citizen of another state, without an averment that A. B. could have sued; and it is not material that the note was transferred by indorsement—the holder may ignore the indorsement and sue as bearer. *Varner v. West*,* 1 Woods, 495.

§ 1248. Where a note was indorsed before being put into circulation, ordering the payment of the contents to the bearer, in a suit against the indorser, it was held that the contract of the indorser was with the bearer, who might be anybody, and that no assignment of the liability would be necessary, and no disability of the original payee to sue in the federal courts would follow the cause of action. *Codman v. Vermont & Canada R. Co.*,* 17 Blatch., 1.

§ 1249. Indorsement in blank.—If the payee of a note indorses it in blank, and the indorsement is filled up to a resident of a different state from that of the payee, the latter may be sued thereon in a federal court. *Dennison v. Larned*,* 6 McL., 496.

§ 1250. When a promissory note is indorsed in blank, a holder who is a citizen of a different state from the maker may sue the maker in a federal court without regard to the citizenship of the previous holders. *Adams v. White*,* 2 Pittsb. R., 25.

§ 1251. When a promissory note is made payable to one or his order, and is indorsed by the payee in blank, it then becomes a note payable to bearer, and any holder thereof may, if he is citizen of a different state from the defendant, sue on it, without regard to whether the previous holder might have sued. The eleventh section of chapter 20 of the judiciary act of 1789 does not apply to such a note. *Towne v. Smith*, 1 Woodb. & M., 119.

§ 1252. Notes.—Averments that the plaintiff and his assignor are citizens of New York, and the defendant of Michigan, and that the note sued upon was made at New York, and at the same place and time was indorsed to plaintiff, are sufficient to sustain the jurisdiction of the circuit court. *Brainard v. Williams*,* 4 McL., 122.

§ 1253. As the federal courts have not jurisdiction between aliens, the assignee of a note to which both parties are aliens could not sue in such courts. If it does not appear upon the record that the character of the original parties would support the jurisdiction, the objection is fatal. *Montalet v. Murray*,* 4 Cr., 46.

§ 1254. The federal courts have no jurisdiction of a suit by the indorsee of a note against the maker and the payee when these are citizens of the same state. *Gibson v. Chew*,* 16 Pet., 315.

§ 1255. A suit was brought in the circuit court for Georgia by the indorsee of a note, a citizen of Alabama, against the maker and the payee, both citizens of Georgia, under a statute of that state providing that the maker and payee may be so joined. *Held*, that as the payee could not have sued in a federal court, the court had no jurisdiction. *Shuford v. Cain*,* 1 Abb., 302.

§ 1256. A statute of Mississippi, requiring all parties to a note to be joined in a suit thereon, will not enable the holder to sue the maker and payee in a federal court, when these are citizens of the same state, as such a suit is prohibited by the restriction in section 11 of the judiciary act. *Dromgoole v. Farmers' and Merchants' Bank*,* 2 How., 241.

§ 1257. When suit is brought upon a promissory note in a federal court, if the maker and payee are both citizens of the same state, the court has no jurisdiction of the case, although the holder of the note, by assignment, is a citizen of a different state. *Ibid*.

§ 1258. Where both maker and payee of a promissory note are citizens of the same state, but the payee, afterwards becoming a citizen of another state, assigns the note to a citizen of the latter, the federal courts have jurisdiction. *Kirkman v. Hamilton*, 6 Pet., 25.

§ 1259. When suit is brought in a federal court on a promissory note payable *to order*, the plaintiff must show that the action could have been maintained if no assignment had been made. *Fry v. Rousseau*, 3 McL., 106.

§ 1260. In a case in the federal courts, where the jurisdiction depends upon the citizenship of the parties, if the suit is brought on a non-negotiable promissory note in the name of the payee, against the maker, and to the use of a third party to whom the claim is assigned, the nominal plaintiff is also the real plaintiff, and if he is a citizen of a different state from the defendant, the jurisdiction is maintained, although the assignee is a citizen of the same state as the defendant. *Irvine v. Lowry*, 14 Pet., 299 (§§ 1207-1209).

§ 1261. Accommodation indorser.—The restriction in section 11 of the judiciary act of 1789 applies to cases where the assignor was a mere accommodation indorser. *Small v. King*,* 5 McL., 147; *Noell v. Mitchell*,* 4 Biss., 346.

§ 1262. An indorsee of an inland bill of exchange may not sue the drawer or acceptor without averring the citizenship of the payee. *Morgan v. Gay*,* 19 Wall., 81; *Fletcher v. Turner*,* 5 McL., 468; *Rogers v. Linn*,* 2 McL., 126.

§ 1263. Suit by indorsee, adding money counts.—A Pennsylvania corporation, through its agents in Boston, sold coal to a citizen of Massachusetts. The agents indorsed the note given for the purchase money to the president of the company, a citizen of New York. The latter sued the purchaser in the federal court in Massachusetts. There was a special count on the note and also general counts. It was held that if the action were considered as a direct one by the corporation on the original consideration, the jurisdiction would be clear; that the court could not consider the plaintiff as prosecuting to recover the note on the special count as indorsee, since the count did not contain the necessary jurisdictional averment that the note could originally have been sued on in that court without the assignment; but that he might recover on the count for money had and received, and not for the original consideration, using the note as evidence, the jurisdiction being sustainable if the corporation had sued on the note. *Heckscher v. Binney*,* 3 Woodb. & M., 333.

§ 1264. Suits between indorsers.—The federal courts have jurisdiction of a suit on a promissory note by an indorsee against an indorser, if they are citizens of different states, although the indorser may not be able to sue the maker in the same court because they are both citizens of the same state. *Evans v. Gee*, 11 Pet., 83 (BILLS AND NOTES, §§ 1178-82).

§ 1265. An indorsee may sue an indorser in the federal court if they are citizens of different states, though the maker and indorser were citizens of the same state. *Codwise v. Gleason*,* 3 Day (Conn.), 3.

§§ 1266-1281. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1266. A suit by a first indorser of a promissory note against a second indorser, upon a collateral promise to share any loss upon the note, may be maintained, although the payee and the defendant are citizens of the same state. *Phillips v. Preston*, 5 How., 290 (BILLS AND NOTES, §§ 603-607).

§ 1267. In a suit in a federal court by an indorsee against his indorser, the citizenship of the drawer is immaterial. *Young v. Bryan*,* 6 Wheat., 146; *Gaylord v. Johnson*,* 5 McL., 448; *Coffee v. Planters' Bank*,* 13 How., 183.

§ 1268. **Mortgage.**—Under statute of 1875, chapter 137, section 1, the federal courts have jurisdiction of a real action for the possession of land brought by the assignee of a note and mortgage, even though the assignor is a citizen of the same state as the defendant, for the proceeding is not one "founded on contract in favor of an assignee." *Whiting v. Wellington*, 10 Fed. R., 815.

§ 1269. The restriction in section 11 of the judiciary act does not prohibit the jurisdiction of the circuit court in a bill to foreclose a mortgage, filed by the assignee of the mortgage. *Dundas v. Bowler*,* 3 McL., 204.

§ 1270. *Semble*, that, under the judiciary act of 1789, a circuit court had no jurisdiction to foreclose a mortgage at suit of a non-resident assignee unless the assignor could have sued, although the note secured by the mortgage was payable to bearer. *Hill v. Winne*,* 1 Biss., 275.

§ 1271. When a mortgagee, a resident of the same state as the mortgagor, transfers the mortgage by delivery to a citizen of another state, the mortgage not being a negotiable instrument, and the assignor not being competent to sue in the circuit court of the United States, the assignee cannot sue by the eleventh section of the judiciary act of 1789. *Mersman v. Werges*, 1 McC., 534 (CONV., §§ 407, 408).

§ 1272. **Judgments.**—The statute giving the circuit court jurisdiction (18 U. S. Stat., pt. 3, p. 470) declares that it shall not have jurisdiction of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made. Under this statute, no action can be brought in the circuit court by the assignee of a judgment rendered on a contract, unless the assignor might have sued, for the judgment is a contract. *Walker v. Powers*, 14 Otto, 248.

§ 1273. When judgment is obtained by a citizen of one state against a citizen of another state in a state court, and assigned to a citizen of the same state as the plaintiff, the assignee can sue on the judgment in a federal court. *Dexter v. Smith*, 2 Mason, 304.

§ 1274. **Suit on judgment.**—Where the indorsee of a promissory note sues, not on the note, but on a judgment already obtained thereon, the circuit court may take jurisdiction, although the original payee could not have sued in that court. *Ober v. Gallagher*, 3 Otto, 199.

§ 1275. When a chose in action is assigned, the assignee cannot sue in the federal courts, though he may be a citizen of a different state from that of the debtor, unless his assignor was also a citizen of another state than the debtor. *Smith v. Railroad Co.*, 9 Otto, 400.

§ 1276. The assignee of a chose in action, being a resident of a different state from the defendant, can sue in the circuit court of the United States, unless it appears affirmatively that his assignor was a citizen of the same state as the defendant. *Manufacturing Co. v. Bradley*, 15 Otto, 180.

§ 1277. **Citizenship at time of suit governs.**—The right of an assignee of a chose in action to bring suit in the circuit court under the judiciary act of 1789 depends upon the citizenship of his assignor at the time of suit brought, and not at the time of contract made. *White v. Leahy*,* 3 Dill., 378.

§ 1278. An executor or administrator is not an assignee, and may sue in the federal courts if he is a citizen of a different state from the defendant, although his testator or intestate could not have sued. *Mayer v. Foulkrod*, 4 Wash., 352.

§ 1279. The receiver of a bank cannot sue in the circuit court of the United States on a note payable to the bank or bearer, if the promisor and the payee are citizens of the same state, although the receiver is a citizen of another state. The eleventh section of the judiciary act of 1789 applies, which forbids an assignee to bring an action in the federal courts, unless his assignor could, and the receiver is not a *bona fide* holder for value, but a trustee for the bank. *Bradford v. Jenks*, 2 McL., 133.

§ 1280. By section 1 of act of congress of March 3, 1875, any assignee may sue in the federal courts without regard to the citizenship of his assignor, unless the suit is founded on contract. Such assignee must show that the suit might have been prosecuted in such court if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, or bills of exchange. *Van Bokkelen v. Cook*, 5 Saw., 591.

§ 1281. **Conveyance pendente lite.**—A state statute provided that, when an action is begun, a voluntary transfer of the claim *pendente lite* by the plaintiff will not abate the action, but it may be continued in his name. An action for real estate having been brought in the federal circuit court by a citizen of one state against a citizen of another, a voluntary transfer

of the plaintiff's interest in the land was made by him to a citizen of the same state as the defendant. It was held that the citizenship of the vendee was immaterial, he not being a party to the cause. *Elliott v. Teal*, 5 Saw., 190.

§ 1282. **Damage suit for neglect to pay note.**—If suit is brought in a federal court for damages suffered by complainants by the neglect of defendant to pay certain promissory notes, and not as assignees of the notes, there is no necessity of showing that the plaintiff's assignor could have sued on the notes, as suit is not brought on the notes. *Weems v. George*, 13 How., 196.

§ 1283. **Damage suit for failure to protest and give notice.**—A suit brought by the assignee of a bank on a claim of the bank against another bank for damages, by reason of its failure to give notice of and protest certain drafts forwarded to the defendant bank, is not a suit brought "to recover the contents of a chose in action," and therefore the rule that an assignee cannot in such cases sue unless his assignor might have sued in the same court does not apply. *Barney v. Globe Bank*, 5 Blatch., 114.

§ 1284. **Suit for conveying property to defeat a judgment.**—A suit by a citizen of one state against citizens of another state for fraudulent conveyances of property, by which plaintiff is deprived of his just rights as creditor of one defendant upon a judgment in the state court, may be maintained in a federal court, although the judgment in question was on a bill of exchange of which the plaintiff was assignee, and therefore under the prohibition of the eleventh section of the judiciary act of 1789, chapter 20. *Bean v. Smith*, 2 Mason, 268.

§ 1285. **Pleading.**—When suit is brought by an indorsee of a promissory note against the maker, in a federal court, and the pleadings show that the parties are citizens of different states, if the declaration is on a money count, there need be no allegation in regard to the citizenship of the indorser under whom the plaintiff claims; otherwise if the declaration sets out a special count on the note, setting forth the chain of indorsers. *Brown v. Noyes*, 2 Woodb. & M., 79.

§ 1286. **Where inability of assignor to sue is not shown by the record.**—Although under the eleventh section of the judiciary act of 1789, an assignee cannot sue in the federal courts unless his assignor could, yet when there is nothing on the record to show that the assignor could not sue, a defendant who has been defaulted cannot raise that question. *Wescott v. Cole*, 4 McL., 80.

§ 1287. While a federal court has no jurisdiction of a suit brought by an assignee of a mortgage to foreclose it, if his assignor could not sue in a federal court because a citizen of the same state as the mortgagor (Judiciary Act, 1789, sec. 11), yet if this fact of the citizenship of the assignor does not appear upon the record, and judgment of foreclosure is given, this judgment will not be treated as a nullity by the circuit court in a collateral proceeding. *Farmers' Loan & Trust Co. v. McKinney*, 6 McL., 7.

§ 1288. **Transfer in order to give a right to sue.**—There is nothing immoral or fraudulent in a transfer of real or personal property to another in order that he may sue in a federal court. Thus where a father delivered bonds, payable to bearer, to his son as a gift, with the understanding that the son would sue upon them in the United States circuit court, being a citizen of a different state from the corporation issuing the bonds, it was held that there was nothing in this transaction to defeat the jurisdiction of the court. *Newby v. Oregon Central R. Co.*, 1 Saw., 65.

§ 1289. A conveyance of land, for full consideration, made for the express purpose of enabling the grantee to sue in a federal court, is not any fraud on the laws of the United States which will prevent the grantee from suing in such court, and it seems that a conveyance without consideration will not. *Briggs v. French*, 2 Sumn., 255.

§ 1290. When a party, otherwise competent, acquires a title for the express purpose of bringing a suit in the federal court, and pays a valuable consideration for his title, the mere fact that the title was conveyed to him expressly to enable him to sue in the federal court is not of itself enough to defeat the jurisdiction. *Blackburn v. Selma, M. & Memphis R. Co.*, 2 Flip., 538 (CORP., §§ 1179-86).

§ 1291. That a transfer of property by a resident of the state to an alien was made for the purpose of enabling the transferee to sue in the United States court, and was for a nominal consideration, will not prevent the transferee from suing in the United States court, although the original owner bear the expenses of the litigation, unless there is a contract on the part of the transferee to reconvey upon the termination of the litigation. *De Laveaga v. Williams*,* 5 Saw., 573.

§ 1292. Trustees, citizens of Pennsylvania, held land to convey it to certain persons forming a population company. One of these persons, a citizen of New York, obtained a conveyance of land in Pennsylvania from the trustees, and brought suit in equity against the occupier of the land, a citizen of Pennsylvania. It was held in the United States circuit

§§ 1293-1307. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

court that though the conveyance was voluntary it was not collusive and would support the jurisdiction. *Bowne v. Aurbuckle*, 4 Dal., 338, n.

§ 1293. If a party holding land upon which he is incompetent to sue in a federal court, by reason of his citizenship, transfer the land to another with the sole intention of avoiding the restriction in section 11 of the judiciary act, yet the grantee may sue if he took in good faith, and without notice of fraud. *Smith v. Kernochen*,* 7 How., 198.

§ 1294. If property be transferred in order that the transferee may sue upon it in the federal court, the motive will not defeat the jurisdiction, provided the transaction be real and not merely colorable. *Ibid.*

§ 1295. The objection that a transfer was merely colorable must be taken by plea in abatement, and is waived by a plea in bar. *Ibid.*

§ 1296. A conveyance executed in order to give plaintiff a right to sue in a federal court must be real and not fictitious. *Barney v. Baltimore*, 1 Hughes, 120.

§ 1297. No party can obtain the right to sue in the federal courts by a device, or colorable transfer. *Lanning v. Lockett*,* 10 Fed. R., 451.

§ 1298. The fact that a note has been transferred to a citizen of another state, to give jurisdiction to the circuit court, will not defeat such jurisdiction; but a mere indorsement without consideration will not be held to constitute a valid transfer for this purpose. *Hawley v. Kepp*,* 2 Flip., 177.

§ 1299. A conveyance of land, made without consideration and collusively, in order that the grantee may, by reason of his citizenship, bring a suit in ejectment in a federal court, will not support the jurisdiction of the court. *Maxfield v. Levy*, 4 Dal., 330.

§ 1300. When land was conveyed to a plaintiff in the United States circuit court by a citizen of the same state as the defendant, without consideration, and it was admitted by the nominal plaintiff that his name was used only for the accommodation of the grantor, the conveyance was held colorable and collusive, and not to give jurisdiction. *Maxwell v. Levy*, 2 Dal., 381.

§ 1301. When suit is brought in the circuit court by a resident of the District of Columbia against several defendants, of whom some are residents of the said District, and those defendants collusively, in order to give jurisdiction to the circuit court, convey their interest in the subject-matter of the suit to a citizen of another state, expecting a reconveyance after the decision of the suit, this conveyance will not support the jurisdiction. *Barney v. Mayor of Baltimore*, 1 Hughes, 122.

§ 1302. Where a party claiming to own certain land upon which he could not sue in the federal court transferred the land to another, upon an agreement that the latter should sue in the federal court, and in case of success should convey to the grantor two-thirds of the lands, and should himself pay one-third the costs of litigation, *held*, that the transaction was not *bona fide*, and the circuit court was without jurisdiction. *Jones v. League*,* 18 How., 76.

§ 1303. If, in order to give the district court jurisdiction of a case, because the plaintiff is a citizen of a different state from the defendant, a citizen of one state makes a merely formal assignment of a claim against a citizen of the same state, to a citizen of another state, and the defendant knowingly acquiesces in the arrangement, and the court assumes jurisdiction, the defendant cannot afterwards avoid the judgment on the ground of a fraud practiced on him. *Mattocks v. Baker*, 2 Fed. R., 456.

§ 1304. Where a citizen of one state conveys land to a citizen of another, in order to confer jurisdiction of an action of ejectment against a defendant in the circuit court of the United States, this fact should be pleaded, if at all, in abatement; and if such conveyance is made without any fraudulent intention and for a valuable consideration, it will support the jurisdiction. *Morgan v. Curtenius*, 4 McL., 367.

§ 1305. If a deed conveying land be sufficient upon its face, the objection that it is colorable and intended to give jurisdiction cannot be taken unless proof of the fact be given. *Hotchkiss v. Glasgow*,* 5 McL., 424.

c. Aliens.

[See CITIZENS and ALIENS, III.]

SUMMARY — *Alien may be plaintiff or defendant*, § 1306.—*Nationality to be averred*, § 1307.

§ 1306. The circuit court has jurisdiction of an action between a citizen of the United States and a foreign subject, whether the latter be plaintiff or defendant. *Hinckley v. Byrne*, §§ 1308-11.

§ 1307. A plea in abatement which merely states that the defendant is an alien is insufficient. It should disclose the foreign state of which he is a subject. *Ibid.*

[NOTES.— See §§ 1312-1327.]

HINCKLEY v. BYRNE.

(Circuit Court for California: Deady, 224-228. 1867.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The complaint in this action alleges “that the plaintiff is a citizen and actual resident and inhabitant of the state of Massachusetts, United States of America,” and “that each and all of the defendants . . . are citizens and residents of the state of California.” There are a large number of defendants. A portion of them plead in abatement to the jurisdiction of the court. One of them pleads separately, submitting to the jurisdiction, but denying the ouster and possession. A number of the defendants do not plead at all. To the plea in abatement, the plaintiff demurs that the matters therein pleaded are not sufficient to abate the action. The plea avers that at the time of the commencement of the action, nor since, *all* the defendants were not citizens of the state of California or of the United States, but that Soo Chung, Hip Hing and William Kroning are each and all aliens and citizens and subjects of the Empire of China, except said Kroning, *who is an alien*.

§ 1308. *An objection that the court has no jurisdiction over a defendant may be raised only by such defendant, except in cases of joint liability.*

The first averment in this plea assumes that because *all* the defendants are not citizens of the state of California, the court has no jurisdiction over any of them; and further, that the defendants joining in this plea, who *are* citizens of California, with one exception, may make the objection that their co-defendants are aliens, although such alien defendants refuse to join in the plea but submit to the jurisdiction. For reasons which will appear hereafter, I do not deem it necessary to absolutely decide the questions suggested by this statement of the plea. But I think that the objection to the jurisdiction of the court, that any of the defendants has not the *status* as to citizenship or alienage to give the court jurisdiction over him, can only be made by such defendant. In an action *ex contractu* where the defendants are jointly liable, such an objection when taken by the proper defendant would abate action as to all, for it must be maintained as a whole or fail. But the objection is a personal privilege, and cannot be made by one defendant for another. This is an action *ex delicto*, without even a community between the defendants in the wrong complained of, except they happen to be within the exterior lines of the premises sought to be recovered. In effect, the action is a separate one against each of them. The defendants are entitled to separate defenses for such parts of the property as they may choose to defend for, and to have a separate verdict and judgment upon such defense. In such case the objection to the jurisdiction of the court on account of the *status* of the defendant should not be allowed to affect the jurisdiction as to other defendants.

§ 1309. *A plea in abatement that all of the defendants are not citizens, etc., would be bad for uncertainty.*

An allegation that all the defendants are not citizens of the state of California, even although *all* the defendants joined in such plea, would be bad for uncertainty, because it would not apprise the plaintiff which of such defendants were not such citizens, so that he could be prepared to support the controverted allegation with proof.

§ 1310. *The circuit court has jurisdiction between a citizen and an alien, whether the latter be plaintiff or defendant.*

But independent of these considerations, this demurrer must be sustained. The plea is bad in every respect. The constitution (art. III, § 2) provides

that "The judicial power shall extend to all . . . controversies between a state or the citizens thereof, and foreign states, citizens or subjects." Section 2 of the judiciary act (1 Stat., 78) provides that "The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, *or an alien is a party*, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." It has long since been settled that an action between aliens *only* cannot be maintained in the circuit court. That the language of the judiciary act, giving jurisdiction where "an alien is a party," must be restrained within the terms of the constitution, which only "extends the judicial power" to an action between an alien and a citizen of a state of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case. *Montalet v. Murray*, 4 Cranch, 46; *Mossman v. Higginson*, 4 Dal., 12; *Piquignot v. The Pennsylvania R. Co.*, 16 How., 104 (§ 1086, *supra*).

But the second part of this plea in abatement assumes that, if the *party defendant* is an alien or subject of a foreign state, the court has no jurisdiction. This assumption is not warranted by the constitution or judiciary act, but is in direct contradiction of both. If the action is *between* a citizen of a state and the subject of a foreign state, the court has jurisdiction. It is immaterial which party is plaintiff or which defendant. In *Jackson v. Twentyman*, 2 Pet., 136, the court says: "That, by the constitution, the judicial power was not extended to private suits in which an alien is a party, *unless a citizen be the adverse party*." The case at bar comes within the latter alternative. Admitting the facts as affirmatively stated in the plea, the court has jurisdiction, because the plaintiff is a citizen of the state of Massachusetts, and the defendants, Soo Chung, Hip Hing and Kroning, are subjects of a foreign state. The action is *between* them, and each is the *adversary* of the other. Then, whether these defendants are all citizens of the state of California, as alleged in the complaint, or a part of them are subjects of a foreign state, as averred in the plea, it makes no difference. The jurisdiction of the court is undoubted in either case.

§ 1311. *A plea in abatement is not sufficient which simply alleges that the defendant is an alien; it should disclose the name of the foreign state of which he is a subject.*

I may add that, as a question of pleading, the plea is otherwise insufficient as to Kroning. It alleges that he is an alien. To allege that a party is an *alien* is not sufficient to *give* jurisdiction to the court. *Wilson v. City Bank*, 3 Sumn., 423. By a parity of reasoning such an averment is not sufficient in a plea of abatement for the purpose of *preventing* the jurisdiction of the courts. The language of the constitution is, that the party is a citizen or subject of a foreign state. As a matter of practice, I think the plea ought also to disclose the name of the particular foreign state of which the party claims to be a citizen or subject, so as to give the adverse party an opportunity to traverse it.

The demurrer is sustained, with leave to the defendants joining in the plea in abatement to answer to the merits within five days, and upon the payment of the costs of the plea and demurrer.

§ 1312. *Suit must be between an alien and a citizen of a state.*—It is not sufficient to give jurisdiction to a federal court that an alien is a party; the controversy must be between a citizen of a state and an alien. *Preniss v. Brennan*,* 2 Blatch., 164. The federal courts

have no jurisdiction of suits between aliens. And where the action was by a citizen of New York against an alien as maker of promissory notes payable to another alien, and indorsed to the plaintiff, it was held that the court had no jurisdiction. *Montalet v. Murray*,* 4 Cr., 46.

§ 1313. It is not sufficient that one of the parties may for some purposes be regarded as a citizen of the United States; he must be a citizen of a state. *Montalet v. Murray*,* 4 Cr., 46.

§ 1314. In suits in the federal court, where the plaintiff is an alien, the record should contain averments of the citizenship of the defendants, otherwise the court will not have jurisdiction of the case. *Jackson v. Twentymen*, 2 Pet., 136.

§ 1315. Where the plaintiff was a native of New York but domiciled in Canada, and the defendant an alien, it was held that the court had no jurisdiction; because in order to give it jurisdiction between individuals the suit must be one in which a citizen of a state and an alien are parties. *Prentiss v. Brennan*,* 2 Blatch., 162.

§ 1316. If a plaintiff alleges himself to be an alien and the defendant a citizen of a state, it is a good plea if the defendant alleges both to be aliens. *Donaldson v. Hazen*, Hemp., 424.

§ 1317. **Averment of alienage.**—Where alienage of one of the parties is relied upon to confer jurisdiction, it must be alleged expressly; it will not be inferred from facts stated or that the party is a subject of a foreign power. *Michaelson v. Denison*,* 3 Day (Conn.), 294.

§ 1318. **Joinder of another alien as defendant.**—When a suit in equity is brought in the United States circuit court by an alien against a citizen of the United States, the joinder of another alien as defendant, particularly if he is not a material party to the bill, will not affect the jurisdiction of the court. *Rateau v. Bernard*, 3 Blatch., 248.

§ 1319. **Suit for use of alien.**—In a suit against a citizen of Virginia, where the plaintiffs were nominally the justices of the peace for a county of the same state, but the suit was solely for the use of an alien, held, the circuit court had jurisdiction. *Browne v. Strode*,* 5 Cr., 303.

§ 1320. **Intention to become a citizen.**—*Seem*, that a foreign subject cannot divest himself of his character as an alien, for judicial purposes, by declaring his intention of becoming a citizen. *Baird v. Byrne*,* 3 Wall. Jr., 1.

§ 1321. **Where stockholder in defendant corporation is also an alien.**—If suit is brought by a friendly alien in the circuit court of the United States, against a corporation chartered by the laws of a state, and against two of its agents, to restrain them by injunction from performing certain acts, the objection that one of the stockholders of the corporation is also a friendly alien will not oust the jurisdiction of the court, as it can proceed against the agents, though it could not against the company alone. *Bonaparte v. Camden & Amboy R. Co.*, Bald., 216.

§ 1322. **Claim based on fraud on revenue.**—A federal court will not support a claim which is based on a fraud on the revenue laws, although the claimant is an alien, for if he imports into the United States he is bound to know the revenue laws. So where A. and B. engaged in commercial transactions, A. being an alien and B. a citizen of the United States, and B. fraudulently obtained an American register for the vessel which they jointly owned and in which they imported their merchandise, thus avoiding payment of the high revenue duties on importations in foreign vessels, it was held that A. could not sue on a balance due him on these importations in a federal court. *Cambioso v. Maffet*, 2 Wash., 103.

§ 1323. **A resident alien, holding real estate,** by virtue of a state law, is entitled to maintain a suit in regard to it in the United States courts. *Bonaparte v. Camden & Amboy R. Co.*, Bald., 216.

§ 1324. A friendly alien residing in a state, and holding land there by a special law of the state, may sue in the circuit court of the United States a corporation chartered by the laws of that state. *Ibid.*

§ 1325. **Injunction against county.**—If an alien owns land in a state which is liable to be taxed to raise money to pay the interest on bonds to be issued by the county in which the land is situated, to assist a railroad company, and the amount of the interest exceeds \$500, the alien may bring a suit, so far as jurisdiction is concerned, in the United States circuit court, to enjoin the county from issuing the bonds. *Goedgen v. Manitowoc County*, 2 Biss., 330.

§ 1326. **Foreign sovereign.**—A suit in our courts by a foreign sovereign is not abated by a change in the person of the sovereign, as here by the deposition of Napoleon III; but the next successor, recognized by our government, is competent to carry on the suit and receive the fruits of it, and the court has authority to permit any necessary change of names. *The Sapphire*, 11 Wall., 164.

§ 1327. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here may prosecute it in our courts. *Ibid.*

d. Corporations.

[See CORPORATIONS.]

SUMMARY — *Citizenship of corporators*, §§ 1328-31. — *Corporation, how found; service upon agent*, §§ 1332-35. — *Corporation chartered by two states*, §§ 1336-39. — *Corporation of one state licensed in another*, § 1340. — *Corporation of one state, however established, may sue in any other*, § 1341. — *Corporation a person within act of 1871*, § 1342. — *Joint stock companies similar to corporations*, § 1343.

§ 1328. A corporation aggregate cannot for jurisdictional purposes be a citizen, and hence the capacity of a corporation to sue in the federal courts depends upon the citizenship of its members. *Bank of United States v. Deveaux*, §§ 1344-45. (Overruled in *Louisville R. Co. v. Letson*, 2 How., 497; § 1329, *infra*.)

§ 1329. When a corporation of one state is sued by a citizen of another, the fact that all of its members are not citizens of the same state will not oust the jurisdiction of the federal courts. *Louisville R. Co. v. Letson*, §§ 1346-50.

§ 1330. A corporation created by and doing business in a particular state is, for the purposes of jurisdiction at least, to be deemed a citizen of that state, without regard to the citizenship of its corporators. *Ibid*.

§ 1331. A suit by a corporation created by two states is regarded as a suit in which citizens of those states are joined as plaintiffs, and the federal courts have no jurisdiction in such a suit against an inhabitant in either state. *Railroad Co. v. Wheeler*, §§ 1351-52. (Qualified in following cases.)

§ 1332. A corporation may be "found," within the meaning of the judiciary act, in another state from that of its creation, and hence the circuit court may take jurisdiction of a case against a foreign insurance company which has in accordance with a state statute agreed that service upon its agent should be considered service upon itself. *Knott v. Insurance Co.*, §§ 1353-55.

§ 1333. Under a Pennsylvania statute requiring foreign insurance companies doing business in that state to designate an agent to accept service of process, the circuit court for Pennsylvania has jurisdiction of a suit by a citizen of that state against a company upon whose agent service was made in accordance with the statute, and it is not a sufficient answer that the defendant is neither an inhabitant of nor found within the district. *Ex parte Schollenberger*, §§ 1356-58.

§ 1334. A corporation may be found out of the state of its creation, and it seems that a trading corporation may be found for the purposes of an action wherever it has an established place of trade. *Hayden v. Androscoggin Mills*, §§ 1359-61. (Overruled in same court by COLT, J., in *Boston Electric Co. v. Electric Gas Lighting Co.*, 1885.)

§ 1335. The authorities have gone no farther than to hold that where, by local law, a foreign corporation may be sued in the state courts by service upon its agent, the federal courts will acquire jurisdiction by a like service. The mere fact that a foreign corporation does business within the district does not bring it within the jurisdiction of the federal court. *Eaton v. Smelting Co.*, §§ 1362-1364.

§ 1336. Where two railroad companies chartered by different states have been consolidated under the laws of those states, the corporation so formed may sue or be sued as a citizen of one of those states, provided that its opponent be a citizen of any other state than that one. *St. Louis R. Co. v. Indianapolis R. Co.*, §§ 1365-68.

§ 1337. A corporation formed as above is composed of two distinct entities, and when suing as a citizen of one state may join as a party defendant the corporation as a citizen of the other. *Ibid*.

§ 1338. When two corporations of different states are consolidated by the laws of those states, the corporation is for some purposes a citizen of each, and may sue or be sued as a citizen of either. *Nashua & Lowell R. Co. v. Boston & Lowell R. Co.*, § 1369.

§ 1339. A corporation was chartered by Indiana and Illinois, the first act being passed by Indiana. Its work was upon the river dividing the two states. Its directors met in either state, though more commonly in Indiana, where lived the president and a majority of the directors. *Held*, it could be sued in Indiana as a citizen of that state, and probably also in Illinois as a citizen of that. *Culbertson v. Navigation Co.*, §§ 1370-73.

§ 1340. A Kansas corporation which, under a general statute of Missouri, purchases and operates a railroad incorporated by and located in Missouri, does not thereby become a corporation of that state, and is still amenable to suit in the federal courts of that state as a foreign corporation. *Williams v. Railway Co.*, § 1374.

§ 1341. A corporation having a legal existence in one state, whether established under the laws of that state or of the United States, may sue in the federal courts of any other state. *Park Bank v. Nichols*, § 1375.

§ 1342. A corporation is within the act of April 20, 1871, giving a right of action to any "person" deprived of rights or privileges, under color of any law of the United States. *Fertilizing Co. v. Hyde Park*, §§ 1376-77.

§ 1343. Joint stock companies, organized under the laws of the different states, and which are practically like corporations, except in the lack of a common seal, are considered the same as corporations, for jurisdictional purposes, and a suit in the name of the president of such a company organized in New York, against a defendant, a citizen of Indiana, may be maintained in the federal court, although some of the stockholders are citizens of the latter state. *Fargo v. Railway Co.*, §§ 1378-79.

[NOTES.—See §§ 1380-1437.]

BANK OF THE UNITED STATES *v.* DEVEAUX.

(5 Cranch, 61-92. 1809.)

ERROR to U. S. Circuit Court, District of Georgia.

STATEMENT OF FACTS.—Plea to the jurisdiction, on the ground that a corporation is not competent to sue in the circuit court of the United States. Demurrer to the plea, and judgment for the defendants. The action was brought by the president, directors and company of the Bank of the United States, and there was an averment that the plaintiffs were citizens of Pennsylvania, and that the defendants were citizens of Georgia.

Opinion by MARSHALL, C. J.

Two points have been made in this cause:

1. That a corporation, composed of citizens of one state, may sue a citizen of another state in the federal courts.
2. That a right to sue in those courts is conferred on this bank by the law which incorporates it. The last point will be first considered.

§ 1344. *The act of incorporation of the Bank of the United States conferred no right on the bank to sue in the federal courts.*

The judicial power of the United States, as defined in the constitution, is dependent: 1st. On the nature of the case; and 2d. On the character of the parties. By the judicial act (1 Stats. at Large, 73) the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded, in the courts of the Union, depends on the character of the parties; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state, claiming lands under grants from different states. Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the judicial act, the Bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States.

The plaintiffs contend that the incorporating act confers this jurisdiction. That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the

federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be.

But the ninth article of the seventh section of the act (1 Stats. at Large, 194) furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or state courts. This evinces the opinion of congress that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. The law expressly recognizes the right of the patentee to sue in the circuit courts of the United States. The court, then, is of opinion that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.

§ 1345. *A corporation aggregate cannot, for jurisdictional purposes, be a citizen. The capacity of a corporation to sue in the federal courts depends upon the citizenship of its members.*

2. The other point is one of much more difficulty. The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different states," both parties must be citizens to come within the description. That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws. A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be that the tribunals of the states will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the

corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken. As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

The statute of Henry VIII., concerning bridges and highways, enacts that bridges and highways shall be made and repaired by the "inhabitants of the city, shire or riding," and that the justices shall have power to tax every "inhabitant of such city," etc., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods and chattels." Under this statute those have been construed inhabitants who hold lands within the city where the bridge to be repaired lies, although they reside elsewhere. Lord Coke says, "every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute." The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself, and, consequently, this ideal existence is considered as an inhabitant when the general spirit and purpose of the law requires it.

In the case of *The King v. Gardner*, 1 Cowp., 79, a corporation was decided, by the court of king's bench, to come within the description of "occupiers or inhabitants." In that case the poor rates, to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be that the poor rates on vacant ground belonging to a corporation may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate *dictum* of Justice Yates, that a corporation could not be an inhabitant or occupier. These opinions are not precisely in point; but they serve to show that for the general purposes and objects of a law this invisible, incorporeal creature of the law may be considered as having corporeal qualities.

It is true that as far as these cases go they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name

of the corporation for the purpose of asserting their corporate rights. Still, the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially. There is a case, however, reported in 12 Mod., 669, which is thought precisely in point. The corporation of London brought a suit against Wood by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation. In that case the objection that a corporation was an invisible, intangible thing, a mere incorporeal legal entity in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle and fortify the decision.

The case of *The Mayor and Commonalty v. Wood* is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other. If, then, the congress of the United States had, in terms, enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one state might sue a citizen of another state in the federal courts by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution. The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one state, suing by a corporate name, and those of another state. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law he is the real proprietor, and he represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the judicial act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name. That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized, by the case in 12 Mod. (on a question of jurisdiction), to look to the character of the individuals who compose the corporation, and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded. If a corporation may sue in the courts of the Union, the court is of opinion that the

averment in this case is sufficient. Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed; plea in abatement overruled, and cause remanded.

LIVINGSTON, J., having an interest in the question, gave no opinion.

LOUISVILLE, CINCINNATI & CHARLESTON RAILROAD COMPANY v. LETSON.

(2 Howard, 497-559. 1844.)

ERROR to U. S. Circuit Court, District of South Carolina.

STATEMENT OF FACTS.—Letson was a citizen of New York. The defendant pleaded to the jurisdiction in substance as follows: 1. That some of its members were citizens of South Carolina, and others of North Carolina. 2. That the state of South Carolina was a member of the defendant company. 3. That the Bank of Charleston and the Charleston Insurance and Trust Company, corporations, were also members, and that some of the members of each were citizens of New York. There was a demurrer to the plea, which was sustained, and the jury found for plaintiff. This writ is prosecuted to review the decision on the demurrer.

Opinion by MR. JUSTICE WAYNE.

The jurisdiction of the court is denied in this case upon the grounds that two members of the corporation sued are citizens of North Carolina; that the state of South Carolina is also a member, and that two other corporations in South Carolina are members, having in them members who are citizens of the same state with the defendant in error.

§ 1346. *The fact that a state is a member of a private corporation does not oust the jurisdiction of the United States courts in a suit against the corporation.*

The objection that the state of South Carolina is a member cannot be sustained. Cases have been already decided by this court which overrule it. The doctrine is, if the state be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction. *United States v. Peters*, 5 Cranch, 115. In the case of *The Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat., 907 (§§ 692, 693, *supra*), this court ruled "that when a government becomes a partner in a trading concern, it divests itself, so far as it concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character." South Carolina stands in the same attitude in the case before us that Georgia did in the case in 9 Wheat. It is no objection, then, to the jurisdiction of the court, on account of the averment in the plea that the state of South Carolina is a member of the Louisville, Cincinnati & Charleston Railroad Company. The true principle is, that the jurisdiction of the circuit courts of the United States cannot be decreed or taken away on account of a state

having an interest in a suit, unless the state is a party on the record. *Osborn v. The Bank of the United States*, 9 Wheat., 852 (CONST., §§ 2363–87). This must be the rule under our system, whether the jurisdiction of the court is denied on account of any interest which a state may have in the subject-matter of the suit, or when it is alleged that jurisdiction does not exist on account of the character of the parties.

§ 1347. *Where a corporation of one state is sued by a citizen of another, the fact that some of its members are citizens of a different state from that in which the suit is brought will not oust the jurisdiction of the United States courts.*

We will here consider that averment in the plea which alleges that the court has not jurisdiction, “because the Louisville, Cincinnati & Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford and Charles Baring, are and were, at the time of commencing the said action, citizens of North Carolina.” The objection is equivalent to this proposition: that a corporation in a state cannot be sued in the circuit courts of the United States, by a citizen of another state, unless all the members of the corporation are citizens of the state in which the suit is brought. The suit, in this instance, is brought by a citizen of New York in the circuit court of the United States for the district of South Carolina, which is the locality of the corporation sued.

Jurisdiction is denied because it is said it is only given when “the suit is between a citizen of the state where the suit is brought and a citizen of another state” (1 Stats. at Large, 78). And it is further said that the present is not such a suit, because two of the corporators are citizens of a third state. The point in this form has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits, until it was made in this case. It has not then been directly ruled in any case. Our inquiry now is, what is the law upon the proposition raised by the plea? Our first remark is, that the jurisdiction is not necessarily excluded by the terms when “the suit is between a citizen of the state where the suit is brought and a citizen of another state,” unless the word citizen is used in the constitution and the laws of the United States in a sense which necessarily excludes a corporation.

A corporation aggregate is an artificial body of men, composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politic, or artificial body, are the franchises and liberties thereof, which bind and unite all its members together, and in which the whole frame and essence of the corporation consist. Bac. Abr., Cor. (A.). It must of necessity have a name, for the name is, as it were, the very being of the constitution, the heart of their combination, without which they could not perform their corporate acts, for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name. Bac. Abr., Cor. (C.). Composed of persons, it may be that the members are citizens; and if they are, though the corporation can only plead and be impleaded by its name, or the name by which it may sue or be sued, if a controversy arises between it and a plaintiff who is a citizen of another state, and the residence of the corporation is in the state in which the suit is brought, is not the suit substantially between citizens of different states, or, in the words of the act giving to the courts jurisdiction, “a suit between a citizen of the state where the suit is brought and a citizen of another state?”

Jurisdiction, in one sense, in cases of corporations, exists in virtue of the

character of members, and must be maintained in the courts of the United States, unless citizens can exempt themselves from their constitutional liability to be sued in those courts, by a citizen of another state, by the fact that the subject of controversy between them has arisen upon a contract to which the former are parties, in their corporate and not in their personal character. Constitutional rights and liabilities cannot be so taken away or be so avoided. If they could be, the provision which we are here considering could not comprehend citizens universally, in all the relations of trade, but only those citizens in such relations of business as may arise from their individual or partnership transactions.

Let it then be admitted, for the purposes of this branch of the argument, that jurisdiction attaches in cases of corporations, in consequence of the citizenship of their members, and that foreign corporations may sue when the members are aliens; does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another state, that all of the corporators must be citizens of the state in which the suit is brought? The argument in support of the affirmative of this inquiry is, that in the case of a corporation in which jurisdiction depends upon the character of the parties, the court looks beyond the corporation to the individuals of which it is composed, for the purpose of ascertaining whether they have the requisite character, and for no other purpose.

The object would certainly be to ascertain the character of the parties, but not to the extent of excluding all inquiry as to what the effect will be, when it has been ascertained that the corporators are citizens of different states from that of the locality of the corporation, where by its charter it can only be sued. Then the question occurs, if the corporation be only suable where its locality is, and those to whom its operations are confided are citizens of that state, and a suit is brought against it by a citizen of another state, whether, by a proper interpretation of the terms giving to the circuit court jurisdiction, it is not a suit between citizens of the state where the suit is brought and a citizen of another state? The fact that the corporators do live in different states does not aid the solution of the question. The first, obvious and necessary interpretation of the terms by which jurisdiction is given is, that the suit need not be between citizen and citizen, but may be between citizens. Then, do the words, "of the state where the suit is brought," limit the jurisdiction to a case in which all the defendants are citizens of the same state?

The constitutional grant of judicial power extends to controversies "between citizens of different states." The words in the legislative grant of jurisdiction, "of the state where the suit is brought and a citizen of another state," are obviously no more than equivalent terms to confine suits in the circuit courts to those which "are between citizens of different states." The words in the constitution, then, are just as operative to ascertain and limit jurisdiction as the words in the statute. It is true, that under these words, "between citizens of different states," congress may give the courts jurisdiction between citizens in many other forms than that in which it has been conferred. But in the way it is given, the object of the legislature seems exclusively to have been to confer jurisdiction upon the court, strictly in conformity to the limitation as it is expressed in the constitution, "between citizens of different states."

A suit, then, brought by a citizen of one state against a corporation by its corporate name, in the state of its locality, by which it was created, and where its business is done by any of the corporators who are chosen to manage its

affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state. The corporators, as individuals, are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the state where the suit is brought, jurisdiction attaches over the corporation; nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different state. It may be said that the suit is against the corporation, and that nothing must be looked at but the legal entity, and then that we cannot view the members except as an artificial aggregate. This is so, in respect to the subject-matter of the suit and the judgment which may be rendered; but if it be right to look to the members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction cannot take it away, when there are other members who are citizens, with the necessary residence to maintain it.

§ 1348. *Strawbridge v. Curtiss*, 3 Cranch, 267, and *Bank of the United States v. Deveaux*, 5 Cranch, 84, overruled.

But we are now met and told that the cases of *Strawbridge v. Curtiss*, 3 Cranch, 267 (§ 881, *supra*), and that of *The Bank of the United States v. Deveaux*, 5 Cranch, 84 (§§ 1344–45, *supra*), hold a different doctrine. We do not deny that the language of those decisions does justify in some degree the inferences which have been made from them, or that the effect of them has been to limit the jurisdiction of the circuit courts in practice to the cases contended for by the counsel for the plaintiff in error. The practice has been, since those cases were decided, that if there be two or more plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction, and in cases of corporations to limit jurisdiction to cases in which all the corporators were citizens of the state in which the suit is brought. The case of *Strawbridge v. Curtiss* was decided without argument. That of the *Bank v. Deveaux* after argument of great ability. But never since that case has the question been presented to this court, with the really distinguished ability of the arguments of the counsel in this, in no way surpassed by those in the former. And now we are called upon in the most imposing way to give our best judgments to the subject, yielding to decided cases everything that can be claimed for them on the score of authority, except the surrender of conscience.

After mature deliberation, we feel free to say that the cases of *Strawbridge v. Curtiss*, and that of *The Bank v. Deveaux*, were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed. Indeed, it is difficult not to feel that the case of *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat., 904 (§§ 295–303, *supra*), is founded upon principles irreconcilable with some of those on which the cases already adverted to were founded. The case of *The Commercial Bank of Vicksburg v. Slocumb*, 14 Pet., 60, was most reluctantly decided upon the mere authority of those cases. We do not think either of them maintainable upon the true principles of interpretation of the constitution and the laws of the United States. A corporation, created by a state, to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be

deemed a citizen of that state. We remark, too, that the cases of *Strawbridge v. Curtiss*, and *The Bank v. Deveaux*, have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert that a majority of the members of this court have at all times partaken of the same regret, and that, whenever a case has occurred on the circuit, involving the application of the case of *The Bank v. Deveaux*, it was yielded to, because the decision had been made, and not because it was thought to be right. We have already said that the case of *The Bank of Vicksburg v. Slocumb*, 14 Pet., 60, was most reluctantly given, upon mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet been done. It has led to a review of the principles of all the cases. We cannot follow further, and upon our maturest deliberation we do not think that the cases relied upon for a doctrine contrary to that which this court will here announce, are sustained by a sound and comprehensive course of professional reasoning. Fortunately, a departure from them involves no change in a rule of property. Our conclusion, too, if it shall not have universal acquiescence, will be admitted by all to be coincident with the policy of the constitution and the condition of our country. It is coincident also with the recent legislation of congress, as that is shown by the act of the 28th of February, 1839 (5 Stats. at Large, 321), in amendment of the acts respecting the judicial system of the United States. We do not hesitate to say that it was passed exclusively with an intent to rid the courts of the decision in the case of *Strawbridge v. Curtiss*.

§ 1349. *The act of February 28, 1839, enlarges the jurisdiction of the federal courts as to parties. The doctrine in Commercial Bank v. Slocumb, 14 Peters, 60, modified.*

But if in all we have said upon jurisdiction we are mistaken, we say that the act of 28th of February, 1839, enlarges the jurisdiction of the courts, comprehends the case before us, and embraces the entire result of the opinion which we shall now give.

The first section of that act provides: "That where in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer." We think, as was said in the case of *The Commercial Bank of Vicksburg v. Slocumb*, that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the eleventh section of the judiciary act which declares: "That no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serv-

ing the writ;" but a re-examination of the entire section will not permit us to re-affirm what was said in that case, that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties. If the act, in fact, did no more than to make a change, by empowering the courts to take cognizance of cases other than such as were permitted in that clause of the eleventh section which we have just cited, it would be an enlargement of jurisdiction as to the character of parties. The clause that the judgment or decree rendered shall not conclude or prejudice other parties, who have not been regularly served with process, or who have not voluntarily appeared to answer, is an exception, exempting parties so situated from the enactment, and must be so strictly applied. It is definite as to the persons of whom it speaks, and contains no particular words, as a subsequent clause, by which the general words of the statute can be restrained. The general words embrace every suit at law or in equity, in which there shall be several defendants, "any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or who shall not voluntarily appear thereto." The words, "shall not be inhabitants of," apply as well to corporators as to persons who are not so; and if, as corporators, they are not suable individually, and cannot be served with process, or voluntarily appear in an action against the corporation of which they are members, the conclusion should be that they are not included in the exception, but are within the general terms of the statute. Or, if they are viewed as defendants in the suit, then, as corporators, they are regularly served with process in the only way the law permits them to be when the corporation is sued by its name.

§ 1350. *A corporation created by and doing business in a particular state is to be deemed a citizen of such state, and may be sued in the federal courts as such, without regard to the citizenship of its corporators.*

The case before us might be safely put upon the foregoing reasoning and upon the statute, but hitherto we have reasoned upon this case upon the supposition that, in order to found the jurisdiction in cases of corporations, it is necessary there should be an averment which, if contested, was to be supported by proof that some of the corporators are citizens of the state by which the corporation was created, where it does its business, or where it may be sued. But this has been done in deference to the doctrines of former cases in this court upon which we have been commenting. But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is that a corporation created by and doing business in a particular state is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it and where its business is done, for all the purposes of suing and being sued. And in coming to this conclusion, as to the character of a corporation, we only make a natural inference from the language of this court upon another occasion, and assert no new principle. In the case of *Dartmouth College v. Woodward*, 4 Wheat., 636 (CONST., §§ 2099–2117), this court says: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of

law. Being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as were supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality — properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being.”

Again, in *The Providence Bank v. Billings*, 4 Pet., 514 (Const., §§ 2321–24), it is said: “The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.” In that case the bank was adjudged to be liable to a tax on its property as an individual. Lord Coke says: “Every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants there within the purview of the statute.” In the case of *King v. Gardner*, in Cowp., 79, a corporation was decided by the court of king’s bench to come within the description of occupiers or inhabitants. In *The Bank v. Deveaux*, the case relied upon most for the doctrines contended for by the plaintiff in error, it is said of a corporation, “this ideal existence is considered as an inhabitant when the general spirit and purposes of the law require it.” If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the circuit court of the United States, when the plaintiff has the proper residence? Certainly the spirit and purposes of the law require it. We confess our inability to reconcile these qualities of a corporation — residence, habitancy and individuality — with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the state in which the suit is brought. When the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction.

Our conclusion makes it unnecessary for us to consider that averment in the plea which denies jurisdiction on the ground that citizens of the same state with the plaintiff are members of corporations in South Carolina, which are members of the Louisville, Cincinnati & Charleston Railroad Company. The judgment of the circuit court below is affirmed.

OHIO & MISSISSIPPI RAILROAD COMPANY v. WHEELER.

(1 Black, 286–298. 1861.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— This action was brought in the circuit court of the United States for the district of Indiana, to recover \$2,400, with ten per cent.

damages, which the plaintiffs alleged to be due for fifty shares of the capital stock of the company, subscribed by the defendant. The declaration states that the plaintiffs are "a corporation, created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio; that the corporation is a citizen of the state of Ohio, and Henry D. Wheeler, the defendant, is a citizen of the state of Indiana."

The defendant pleaded to the jurisdiction of the court, averring that he was a citizen of the state of Indiana, and that the plaintiffs were a body politic and corporate, created, organized and existing in the same state, under and by virtue of an act of assembly of the state. The plaintiffs demurred to this plea; and the judges being opposed in opinion upon the question whether their court had jurisdiction, ordered their division of opinion to be certified to this court.

§ 1351. *Review of authorities upon the citizenship of corporations.*

A brief reference to cases heretofore decided will show how the question must be answered. And, as the subject was fully considered and discussed in the cases to which we are about to refer, it is unnecessary to state here the principles and rules of law which have heretofore governed the decisions of the court, and must decide the question now before us. In the case of *The Bank of Augusta v. Earle*, 13 Pet., 519 (CORP., §§ 1123-35), the court held that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

It had been decided, in the case of *The Bank v. Deveaux*, 5 Cr., 61 (§§ 1344-45, *supra*), long before the case of *The Bank of Augusta v. Earle* came before the court, that a corporation is not a citizen, within the meaning of the constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different state from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that state. But, if that be the case, they may sue by their corporate name, averring the citizenship of all the members; and such a suit would be regarded as the joint suit of the individual persons, united together in the corporate body, and acting under the name conferred upon them, for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another state.

This question, as to the character of a corporation, and the jurisdiction of the courts of the United States, in cases wherein they were sued or brought suit in their corporate name, was again brought before the court in the case of *The Louisville R. Co. v. Letson*, 2 How., 497 (§§ 1346-50, *supra*); and the court in that case, upon full consideration, decided that where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible for the purposes of withdrawing the suit from the jurisdiction of a court of the United States. The question, however, was felt by this court to be one of great difficulty and delicacy; and it was again argued and maturely considered in the case of *Marshall v. The Baltimore & Ohio R. Co.*, 16 How., 314 (CON-

TRACTS, §§ 555–62), as will appear by the report, and the decision in the case of *The Louisville R. Co. v. Letson*, reaffirmed.

And again, in the case of *The Covington Drawbridge Company v. Shepherd*, 20 How., 232 (§§ 1088–89, *supra*), the same question of jurisdiction was presented, and the rule laid down in the two last mentioned cases fully maintained. After these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate name as a suit by or against citizens of the state which created it.

§ 1352. *A suit by a corporation created by two states is regarded as a suit in which citizens of those states are joined as plaintiffs, and the federal courts have no jurisdiction in such a suit against an inhabitant of either state.*

It follows from these decisions that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described. The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of *The Bank of Augusta v. Earle*, before referred to.

It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States. These questions, however, have been so fully examined in the cases above referred to, that further discussion can hardly be necessary in deciding the case before us. And we shall certify to the circuit court that it has no jurisdiction of the case on the facts presented by the pleadings.

KNOTT v. SOUTHERN LIFE INSURANCE COMPANY.

(Circuit Court for Alabama: 2 Woods, 479-483. 1874.)

STATEMENT OF FACTS.—Motion to dismiss for want of jurisdiction, on the ground that defendant, being a Tennessee corporation, cannot be sued in the United States circuit court for Alabama, by virtue of process served upon its agent. The code of Alabama required that foreign insurance companies doing business in that state should agree that process served upon or acknowledged by their agents should be service upon the company. Defendant had so agreed, but insisted that the stipulation only applied to state courts.

Opinion by WOODS, J.

The eleventh section of the judiciary act (1 Stat., 78 and 79; R. S., sec. 629) provides that the circuit courts shall have original cognizance of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. The same section also declares that no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

The first requirement of the law just cited is filled. The suit is between a citizen of the state where the suit is brought and a citizen of another state. The plaintiff is averred to be a citizen of the state of Alabama, and the defendant a citizen of the state of Tennessee. The defendant corporation having been created by the state of Tennessee, for the purposes of the jurisdiction of the United States courts it must be regarded as a citizen of the state where it was incorporated, and no averment or proof as to the citizenship of its members elsewhere will be permitted. This is a presumption of law which is conclusive. *Louisville R. Co. v. Letson*, 2 How., 497 (§§ 1346-50, *supra*); *Marshall v. B. & O. R. Co.*, 16 How., 329 (CONTRACTS, §§ 555-62); *Ohio & M. R. Co. v. Wheeler*, 1 Black, 297 (§§ 1351-52, *supra*). The plaintiff then being a citizen of the state where the suit is brought, and the defendant a citizen of another state, it is only necessary, to give this court jurisdiction of the cause, that the defendant should be an inhabitant of or found within the district for which the court sits.

The plaintiff claims that the averments of the complaint and the return of the marshal show that the defendant has been "found" within the southern district of Alabama. It is well settled that the resident of another district, by an appearance generally, waives his privilege not to be sued out of the district where he resides or is found. *Irvine v. Lowry*, 14 Pet., 293 (§§ 1207-1209, *supra*); *Levy v. Fitzpatrick*, 15 id., 167 (APPEALS, §§ 319-20); *Flanders v. Insurance Co.*, 3 Mason, 158; *Kitchen v. Strawbridge*, 4 Wash., 84.

§ 1353. *A corporate body, being a citizen of the state by which it was incorporated, cannot migrate, but may exercise its functions in another state upon terms prescribed by that state.*

But defendant insists that a corporate body can only be a citizen of the state by which it was created; that it cannot migrate; that it cannot become an inhabitant of another state, nor can it be "found" therein. To support this view, reliance is placed on the cases of *Bank of Augusta v. Earle*, 13 Pet., 519 (CORP., §§ 1123-35); *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286 (§§ 1351-52, *supra*). The doctrine of these cases has been modified by later decisions.

While it is settled law, as already seen, that a corporation created by one state cannot migrate and become a citizen of another state, yet it may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly. *Railroad Co. v. Harris*, 12 Wall., 81 (Corp., §§ 1166-74).

In the case just cited, the defendant company was held to be a Maryland corporation. It was sued in the circuit court of the District of Columbia. The law regulating the jurisdiction of that court (sec. 6, act of February 7, 1801; 2 Stat., 106) is identical with the second clause of the eleventh section of the judiciary act of 1789 above quoted. It declares "that no action shall be brought before said court by any original process, against any person who shall not be an inhabitant of or found within said District at the time of serving the writ."

§ 1354. *A corporation may be "found" in a state other than that by which it was created.*

An act of congress, approved February 22, 1867 (14 Stat., 404), provided that foreign corporations doing business in the District of Columbia might be served with process by service on their agents, and such service should be effectual to bring the corporation before the court. In the case of *The Railroad Co. v. Harris*, service was made within the District of Columbia upon the agent of the Maryland corporation, and the court held, in effect, that the service was a good one, and brought the defendant into court. This case then settled the question that a corporate body may, in the language of the judiciary act, be "found" in a state other than that by whose law it was created. If then the defendant company has agreed that service upon its agent in Mobile of process issued from the United States courts shall be taken and held as service upon the company, I think the defendant, by service upon Walthall, has been "found" within this district.

§ 1355. *The agreement of a corporation that process may be served on its agents, though made under a state statute, applies as well to federal as to state process, if the statute is general in its terms.*

The defendant insists, however, that its agreement touching service of process only applies to process issued from the state courts. It seems to me to be a sufficient answer to this, that no such intimation is to be found in the statute. It is general in its terms, and applies to the process of all the courts held within the state. The statute was intended for the protection of the citizens of the state in their dealings with foreign insurance companies. It provides that they should place on record their appearance in advance, in any suit that may be brought, whether in a state court or federal court. The state, by section 1180 of the code, has not attempted to vest this court with any new jurisdiction it did not possess under the constitution and laws of the United States. If the defendant, on suit brought, had voluntarily appeared in this court and acknowledged service of process, or waived it, there can be no question that this court would have jurisdiction. All the state law has done has been to require that the defendant should agree, as a condition precedent to the transaction of business within the state, that upon suit brought, it should either authorize its agent to acknowledge service of process, or allow service to be made on him. There is no restriction of this agreement to process issued by

the state court, and in my judgment it applies to the process of the United States courts as well.

If these views be correct, it follows that the defendant is properly in court; that the court has acquired jurisdiction of its person, and having, as is conceded, jurisdiction of the subject-matter, it is authorized to proceed with the cause to final judgment. The motion to dismiss must be overruled.

EX PARTE SCHOLLENBERGER.

(6 Otto, 369-378. 1877.)

PETITION for a *mandamus*.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is a petition for a writ of *mandamus*, requiring the judges of the circuit court of the United States for the eastern district of Pennsylvania to hear and determine certain suits brought in that court in favor of the relators against a number of insurance companies incorporated by the laws of other states, but doing business in that state under a license granted pursuant to a statute regulating that subject. The circuit court declines to entertain jurisdiction of the causes, for the reason, as is alleged, that the defendant companies were not “at the commencement of the respective suits, or at any time, inhabitants of or found in the said district.” This presents the only question in the case, as it is conceded that the citizenship of the parties is such as to give the court jurisdiction, if the several defendants can be sued in the district without their consent.

A statute of Pennsylvania provides that “no insurance company not of this state, nor its agents, shall do business in this state until he has filed with the insurance commissioner of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this state; and, if such company should cease to maintain such agent in this state, so designated, such process may thereafter be served on the insurance commissioner; but, so long as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this state, and that such service of process according to this stipulation shall be sufficient personal service on the company. The term ‘process’ includes any writ of summons, subpœna or order whereby any action, suit or proceedings shall be commenced, or which shall be issued in or upon any action, suit or proceedings brought in any court of this commonwealth having jurisdiction of the subject-matter.” Laws of Penn., 1873, p. 27, sec. 13.

The return to the rule to show cause admits that all the defendant companies were doing business in the state under this statute, and that their designated agents were duly served with process in each of the suits. For the purposes of this hearing, the fact of due service upon the agents must be considered as established. If in reality it is not so, the court below will not be precluded by anything in this proceeding from inquiring into the truth, and acting upon the facts as they are found to exist.

§ 1356. *A circuit court of the United States has jurisdiction over insurance companies of other states doing business within its district under a stipulation with the state to receive service of process there.*

The act of 1875, determining the jurisdiction of the circuit courts (18 Stat., 470), and which in this particular is substantially a re-enactment of the act of 1789 (1 Stat., 79, sec. 11), provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except," etc.

It is unnecessary to inquire whether these several companies were inhabitants of the district. The requirements of the law, for all the purposes of this case, are satisfied if they were found there at the time of the commencement of the suits; and that question, we think, was settled in *Railroad Co. v. Harris*, 12 Wall., 65 (Corp., §§ 1166-74). In that case it appears that, when the suit was commenced, the statutes defining the jurisdiction of the courts of the District of Columbia provided that "no action or suit shall be brought . . . by any original process against any person who shall not be an inhabitant of or found within the District at the time of serving the writ." 2 Stat., 106, sec. 6. Afterwards, in 1867, the law was changed in respect to foreign corporations doing business in the District, and service allowed upon the agent (14 Stat., 404, sec. 11); but when the suit was begun and the process served the old law was in force. The Baltimore & Ohio Railroad Company, a Maryland corporation, was authorized by congress to construct and extend its railroad into the District of Columbia. Harris, having been injured while traveling as a passenger upon the railroad outside of the District, sued the company in the supreme court of the District, and caused the writ to be served upon the president of the company within the District. The company objected to the jurisdiction of the court, and insisted that it was neither an inhabitant of nor found within the District. In ruling upon this objection, we held that, although the company was a foreign corporation, it was suable in the District, because it had, in effect, consented to be sued there, in consideration of its being permitted by congress to exercise therein its corporate powers and privileges. The language of the court, speaking through Mr. Justice Swayne, is: "It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly." Then, after an examination of the statute granting the right to extend the road, it was said (p. 84): "We entertain no doubt that it made the company liable to suit where this suit was brought, in all respects as if it had been an independent corporation of the same locality." This language was cited with approbation, and adopted as a correct exposition of the law, by Mr. Justice Field, speaking for the court, in *Railway Co. v. Whitton*, 13 Wall., 270 (§§ 585-588, *supra*).

§ 1357. *Under the statute of Pennsylvania a circuit court of the United States can take jurisdiction of suits against foreign insurance companies.*

Applying these principles to the present case, there cannot be any doubt, as it seems to us, of the jurisdiction of the circuit court over these defendant companies. They have in express terms, in consideration of a grant of the

privilege of doing business within the state, agreed that they may be sued there; that is to say, that they may be found there for the purposes of the service of process issued "by any court of the commonwealth having jurisdiction of the subject-matter." This was a condition imposed by the state upon the privilege granted, and it was not unreasonable. *Lafayette Ins. Co. v. French*, 18 How., 404 (CORP., §§ 1140-45). It was insisted in argument that the statute confines the right of suit to the courts of the state; but we cannot so construe it. There is nothing to manifest such an intention; and, as the object of the legislature evidently was to relieve the citizens of Pennsylvania from the necessity of going outside of the state to seek judicial redress upon their contracts made with foreign insurance companies, it is but reasonable to suppose that they were entirely at liberty to select the court in the state having jurisdiction of the subject-matter, which, in their judgment, was the most convenient and desirable. As the company, if sued in a state court, could remove the cause to the circuit court, and thus compel a citizen of the state to submit to that jurisdiction, we see no reason why the citizen may not, if he desires it, bring the company into the same jurisdiction at the outset. While the circuit court may not be technically a court of the commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for.

§ 1358. *State legislation and consent of parties may operate to give jurisdiction to federal courts.*

States cannot by their legislation confer jurisdiction upon the courts of the United States; neither can consent of parties give jurisdiction when the facts do not; but both state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. *Ex parte McNiel*, 13 Wall., 236. Thus, if the parties to a suit, both plaintiff and defendant, are in fact citizens of the same state, an agreement upon the record that they are citizens of different states will not give jurisdiction. But if the two agree that one shall move into and become a citizen of another state, in order that jurisdiction may be given, and he actually does so in good faith, the court cannot refuse to entertain the suit. So, as in this case, if the legislature of a state requires a foreign corporation to consent to be "found" within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the state, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding, beyond which the court will not ordinarily look.

A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. Under such circumstances, it seems clear that it may, for the purpose of securing business, consent to be "found" away from home, for the purposes of suit, as to matters growing out of its transactions. The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which

they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the circuit court has jurisdiction of the causes, and should proceed to hear and decide them.

We are aware that the practice in the circuit courts generally has been to decline jurisdiction in this class of suits. Upon an examination of the reported cases in which this question has been decided, we find that in almost every instance the ruling was made upon the authority of the late Mr. Justice Nelson, in *Day v. The Newark India Rubber Manuf. Co.*, 1 Blatch., 628 (§§ 1622–25, *infra*), and *Pomeroy v. The New York & New Haven R. Co.*, 4 id., 120. These cases were decided by that learned justice, the one in 1850 and the other in 1857, long before our decision in *Railroad Co. v. Harris*, *supra*, which was not until 1870, and are, as we think, in conflict with the rule we there established. It may also be remarked that Mr. Justice Nelson, as a member of this court, concurred in that decision. Judge Woods, of the fifth circuit, has already decided in favor of the jurisdiction in *Knott v. The Southern Life Ins. Co.*, 2 Woods, 479 (§§ 1353–55, *supra*), and Judge Dillon, of the eighth circuit, declined to take it, only because he felt himself foreclosed by the rulings of other judges, and especially of Mr. Justice Nelson. *Stillwell v. The Empire Fire Ins. Co.*, 4 Cent. L. J., 463.

Writ of mandamus granted.

HAYDEN v. ANDROSCOGGIN MILLS

(Circuit Court for Massachusetts: 1 Federal Reporter, 93–96. 1879.)

STATEMENT OF FACTS.—Action of trespass for the infringement of a patent. The defendant was incorporated under the laws of Maine, and was doing business in Boston. By the return of the marshal it appeared that he attached a chip as the property of the defendant, and delivered a summons to the president of the company. Motion to dismiss.

Opinion by LOWELL, J.

The important point of jurisdiction intended to be raised by the defendants cannot be decided in their favor upon a motion to dismiss, because it is entirely consistent with this record that the defendants should have an agent here expressly authorized to accept service, or that some other fact should exist which would prove the defendants to be subject to process here under the recent decisions. Such a motion is not well advised for another reason: that the supreme court might, in one event, refuse to revise my action. *Toland v. Sprague*, 12 Pet., 300.

As the point has been fully argued, I see no impropriety in my giving my opinion upon it, taking the facts to be as I understood the parties to state them. Those facts are, that the corporations are chartered in Maine, and have each a principal, if not the principal, place of business in Massachusetts, where most of the business, financial and other, except the actual manufacture, is done, and, indeed, from which the manufacture itself is directed and controlled. I suppose that most of the stockholders and officers live here. I do not mean to say that this fact alone would be very material. The question is, whether such a corporation is suable here in a transitory action begun in the circuit court of the United States without an effectual attachment of property.

§ 1359. *A corporation may be found out of the state of its creation.*

The acts of congress from the beginning have prohibited the maintenance of original civil suits against any one unless he shall be an inhabitant of, or be

found within, the district where the suit is brought. The foundation of natural justice upon which this practice was supposed to rest has been much weakened by the decision that, in admiralty, a personal action may be maintained against an absent defendant by attachment of his goods. *Atkins v. Disintegrating Co.*, 18 Wall., 272.

Formerly the circuit courts, following the high authority of Mr. Justice Nelson, were accustomed to hold that a corporation could not be "found" beyond the limits of the state or country by whose authority it was chartered. This rule worked badly, and especially in patent cases; for, if a corporation, by its agents, maintained a flagrant breach of a patent right within any judicial district, there was no adequate redress in the place of infringement; and if the corporation happened to be chartered in Europe, or South America, or Canada, there was no adequate redress anywhere within the United States, for no one will affirm that the power to enjoin the agent, and to sue him personally for damages, will meet the requirements of all or of most patent cases.

Fortunately the supreme court have taken a different view of the subject, and in three decisions have held, in the first, that a corporation may be found in any place where it has exercised its corporate powers by express consent of the legislature, and in the second and third, that a foreign company, which is required by a general law of the state to appoint an agent for service of process, as a condition to its transaction of business in the state, may be sued in either the state or federal courts. *Railroad Co. v. Harris*, 12 Wall., 65 (CORP., §§ 1166-74); *Lafayette Ins. Co. v. French*, 18 How., 404 (CORP., §§ 1140-45); *Ex parte Schollenberger*, 96 U. S., 369 (§§ 1356-58, *supra*). Since these decisions were made two cases have arisen in the circuits in which the general laws of a state making foreign corporations suable have been applied to suits in the courts of the United States, held within that state, without the appointment of an agent for that particular purpose. *Williams v. Empire Transportation Co.*, 14 Off. Gaz., 523; *Wilson Packing Co. v. Hunter*, 7 Reporter, 455.

§ 1360. *Semble, that by Massachusetts law a foreign corporation having its principal establishment in that state is found there, and amenable to service upon its agent.*

The case before me differs from any which has been decided, in this: By the statutes of Massachusetts, as construed by the supreme judicial court, actions against foreign corporations must be begun by effectual attachment of property. *Andrews v. Mich. Cent. R. Co.*, 99 Mass., 534. Here there was no such attachment. The Massachusetts law gives their courts jurisdiction when there is an attachment, though the corporation is not found in the state, having no agent or place of business there. Under our statutes an action cannot be begun in that way in the federal courts unless the defendant is found here. Therefore if there had been an attachment in this case the question would still remain, whether the defendant had been found here. Now no Massachusetts case, that I have seen, holds that a foreign trading corporation, having its principal establishment here, is not found here, but must be brought in by publication, as in the case of a defendant actually absent. As attachment cannot give us jurisdiction, so the want of it cannot in my opinion take it away, if the defendant is here. The service is sufficient in form by the law of this state, and would bind a domestic corporation in the state courts, and I think it would likewise suffice for a foreign corporation, except for the general rule requiring attachments against them, which cannot affect us.

§ 1361. *Semble, that a trading corporation is personally present for the purposes of an action wherever it has an established place of trade.*

I think a trading corporation may be said to be personally present for the purposes of an action wherever it has an established place of trade. This was so decided in England on principle, and as a new question, as late as the year 1872. *Newby v. Von Oppen*, L. R., 7 Q. B., 293. That was the case of the Colt Patent Arms Company, having a house in London for the sale of its manufactures. In the only other case that I have seen, the ticket office of a railroad company was held not to be such a place of trade as to give jurisdiction, and the court say that the question is one of fact in each case. *Mackereth v. Glasgow R. Co.*, L. R., 8 Ex., 149. In the United States most of the cases turn upon the words of a statute, but the reasoning is often more general, and is, I think, in substantial accordance with the law of England, namely, that a trading corporation is of right suable in any country in which it conducts an important part of its business. Accordingly the tendency of opinion, if I may so call it, is to apply general words concerning corporations to include foreign corporations under those circumstances. See *Angell & Ames, Corp.*, §§ 402-406; *Rorer*, *Interstate Law*, 282.

Upon the whole I think I am authorized to decide that a foreign corporation may be sued in the circuit court here under the circumstances existing in this case as I understand them; though the fact of attachment, immaterial to our jurisdiction, does not exist. If the question should be brought up in some new form, and the facts should prove to be different, my decision may be different. Motion to dismiss denied.

EATON v. ST. LOUIS SHAKSPEAR MINING AND SMELTING COMPANY.

(Circuit Court for Missouri: 2 McCrary, 362-370. 1881.)

STATEMENT OF FACTS.—This case was heard on a motion to dismiss for want of jurisdiction. The defendant was an Illinois corporation. Service of process was made upon the secretary of the corporation in St. Louis.

§ 1362. *Review of authorities upon question of suits against foreign corporations, brought by service upon an agent.*

Opinion by McCRARY, J.

The respondent corporation was organized, under the law of Illinois, to carry on the business of mining, and is for jurisdictional purposes to be regarded as a citizen of that state. The motion to dismiss being before us for consideration, the important question is, whether such a foreign corporation can be sued in this court upon the ground that it has an office in the city of St. Louis for the transaction of its business, and upon service made at such office upon its secretary. We construe the return as showing that service was made upon the secretary at the office of the company in the city of St. Louis. The general question of the right of a creditor of a foreign corporation to sue such corporation in a federal court of any district in which it may have an office, and an officer or agent for the transaction of its general business, has been considered in the following, among other cases: *Railroad Co. v. Harris*, 12 Wall., 65 (CORP., §§ 1166-74); *Ex parte Schollenberger*, 96 U. S., 369 (§§ 1356-58, *supra*); *Hayden v. Androscoggin Mills*, 1 Fed. R., 93 (§§ 1359-61, *supra*); *Runkle v. Ins. Co.*, 2 Fed. R., 9; *Brownell v. Railroad Co.*, 3 Fed. R., 761; *Williams v. Transp. Co.*, 14 Off. Gaz., 523; *Wilson Packing Co. v. Hunter*, 7 Reporter (Boston), 455.

Railroad Co. v. Harris was a suit brought in the supreme court of the Dis-

trict of Columbia against the Baltimore & Ohio Railroad Company, a Maryland corporation. It was held that the corporation was *found* within the District of Columbia. The act of congress, upon the construction of which the question was decided, authorized the company to build a branch road into the District of Columbia, and provided as follows: "And the said Baltimore & Ohio Railway Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions, in the construction and extension of said lateral road into and within said District, as they may exercise or be subject to under or by virtue of the said act of incorporation, in the extension and construction of any railroad within the state of Maryland, and shall be entitled to the same rights, benefits and immunities in the use of said road, and in regard thereto, as are provided in said charter, except the right to construct any lateral road or roads in said District from said lateral road." It was held that under this act, while there was but one corporation in Maryland and the District of Columbia, there was a unity of ownership throughout, and that the corporation might be sued in the District of Columbia for injuries done on its road outside of said District.

In *Ex parte* Schollenberger the facts were: That a foreign corporation was transacting business in Pennsylvania under a statute which provided that the company should file a written stipulation agreeing that process issued in any suit brought in any court of the commonwealth having jurisdiction of the subject-matter, and served upon an agent specified by the company to receive service of process for it, should have the same effect as if personally served upon the company within the state. It was held in this case that a corporation may consent to be sued in a foreign state in consideration of its being permitted to carry on its business there, and accordingly it was held that such a corporation, doing business in Pennsylvania under said statute, was found there within the meaning of the act of congress. The decision is put distinctly upon the ground that the law of the state required foreign corporations to consent to be "found" there as a condition precedent to their being permitted to transact business in the state, and that the company in that case had so consented. These are the latest adjudications of the supreme court upon the subject.

In *Hayden v. Androscoggin Mills*, in the circuit court for the district of Massachusetts, Lowell, C. J., went further, and held that, independently of any local statute, a trading corporation is of right suable in a country in which it transacts an important part of its business. *Runkle v. Ins. Co.* is in all respects like the case of *Ex parte* Schollenberger, and was decided upon the authority of that case, and under a similar statute. In *Wilson Packing Co. v. Hunter* it was held by Drummond, C. J., that a Missouri corporation, owning and possessing a slaughter-house and stock-yard in East St. Louis, Illinois, where beef to be canned by said company was slaughtered and dressed for and in the name of the company, could be sued in the circuit court of the United States for the southern district of Illinois. The liability of such a corporation to be sued in Illinois, it was held, might be inferred from its right to do business in that state, although there was no express provision of law authorizing service upon it within that state. In *Williams v. Transportation Co.*, in the United States circuit court for the eastern district of New Jersey, it was held that a foreign corporation, without charter from a state, but transacting business therein, and amenable to process of its courts in accordance with local law, is *found* within the state in the sense of the judiciary acts, and may be sued in the United States circuit court.

§ 1363. *The extent of the authorities thus far is to hold that where, by local law, a foreign corporation is amenable to suit in the courts of a state by service upon an agent, the federal courts may acquire jurisdiction by a like service.*

It will be seen by an examination of these and other cases, that, according to the great weight of authority, the most that can be claimed in favor of the jurisdiction of federal courts is, that where, by the local law, the foreign corporation is amenable to suit in the courts of the state, service being made upon an agent within the state, the federal courts may be regarded as courts of the state, and may take jurisdiction upon such service as would be good in a state court. At all events, we are unwilling to go further than this. We do not agree to the proposition that the mere fact that a foreign corporation does business within the district brings it within our jurisdiction, in the absence of a local law which authorizes service of the process of the state courts upon it. The state and federal courts, upon a question such as this, should be governed by the same rule, to the end that citizens litigating their rights in the two forums shall stand upon an equality.

§ 1364. *Construction of statutes of Missouri on the subject of jurisdiction over foreign corporations.*

It becomes necessary, therefore, to consider the legislation of this state upon the subject. There is no statute in Missouri requiring foreign corporations in general, transacting business in this state, to subject themselves to the jurisdiction of its courts. The Revised Statutes of 1855 contained a provision as follows: "Any corporation, incorporated by any other state or country, and having property in this state, shall be liable to be sued, and the property of the same shall be subject to attachment in the same manner as individual residents of other states and countries, having property, are now liable to be sued and their property subject to attachment." R. S. 1855, ch. 34, § 22. By act approved March 14, 1859, it was provided: "That all railroad companies who own and operate roads terminating opposite to the city of St. Louis, whose chief office or place of business is in St. Louis, shall be sued in the same manner, and no other, that railroad companies chartered by the laws of this state are now sued." Acts 1859, p. 67.

These provisions were embodied in the revision of 1865, ch. 22, § 17. By an act passed in 1877 it was provided as follows: "All railroad corporations that own or operate roads terminating opposite to any point in this state, and which have offices or places of business in this state, shall be sued in the same manner as railroad corporations chartered by this state." Laws 1877, p. 369. Similar statutes have from time to time been enacted with reference to foreign insurance companies, but none in general terms applying to all foreign corporations. Another statute, and the one chiefly relied on by complainant, provides as follows: "A summons shall be executed, except as otherwise provided by law: . . . *fourth*, where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business; or, if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained."

It has been held by the supreme court of Missouri, that, under the above-mentioned act of March 14, 1859, foreign railroad companies were not liable to

be sued in the courts of this state without an attachment of property, unless in the case of a company owning a railroad terminating opposite the city of St. Louis, and having its chief office for the transaction of its business in that city. *Robb v. Railroad Co.*, 47 Mo., 540, and cases cited. This was held upon the principle that a statute specifying what particular foreign corporations may be sued in this state necessarily excludes suits against such as are not included within the terms of the law. The later act enlarges the right of suit by extending it to railroad companies having lines of road terminating opposite to *any point in this state*, and which have an office or place of business in this state, whether it be its *chief* office or not; but it still applies only to railroad corporations.

It is thus seen that the action in the present case could not be maintained in a state court, under the decisions of the supreme court of Missouri, in the absence of the last statute above quoted. The question then is, does that statute enlarge the jurisdiction of the courts of the state, and authorize suits *in personam* therein against foreign corporations, in cases not coming within the laws previously in force? It will be observed that it is a statute regulating the service of summons upon a foreign corporation. The natural construction of such a statute is that it is intended to regulate service of process in such cases as are authorized by law to be brought—in such cases as come within the jurisdiction of the court; not that it is intended to confer jurisdiction in cases not covered by previous legislation. It is strongly urged by counsel that the act was intended by the legislature to go further, and to authorize suits to be brought against all foreign corporations having offices and agents in this state, and it is said that great inconvenience will result from any other construction. We recognize the fact that it is important that laws should be enacted authorizing suits against corporations wherever they are found doing business; but it must also be conceded that it is the duty of the legislature, and not that of the courts, to make such laws. If the statute of Missouri as it now stands, and being fairly construed, does not authorize such suits to be brought in the courts of the state, we are not disposed to assert the jurisdiction of this court. Although the supreme court of this state has not passed upon the question of the true construction of the act last mentioned, it has received the careful consideration of the St. Louis court of appeals, in the recent case of *McNichol v. The U. S. Mercantile Reporting Agency*, where, in a well-reasoned opinion, it is held that the statute does not authorize suits against *all* foreign corporations doing business in this state. It is held that the several acts must be construed together; that they are not necessarily in conflict, and that it is the duty of the courts to give full effect to each; and it is said:

“The clause in question is perfectly consistent in terms with section 742. The latter section prescribes in exact terms what right of action shall exist against foreign corporations. The section under consideration goes no further than to prescribe the manner in which process shall be served on such corporations. It says nothing about the effect of such service; that is left subject to the operation of other provisions of the Revised Statutes, and under those provisions it can have no more operation than as a substitute for constructive notice in a proceeding against a non-resident individual.”

For the present, and until the question shall be decided by the supreme court of Missouri, we shall adopt and follow this ruling. As, however, the case just cited is now, as we understand, pending on appeal in the supreme court of the

state, the complainant may, if he sees fit, have this case continued until that court shall give an authoritative construction to the statute, which will be adopted by us as the rule of decision here. If complainant does not adopt this suggestion the motion to dismiss will be sustained.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY *v.* INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY.

(Circuit Court for Indiana: 9 Bissell, 144-156. 1879.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—This is a bill filed by the St. Louis, Alton & Terre Haute Railroad Company against the Indianapolis & St. Louis Railroad Company, and other railroad companies, to enforce the obligations of a contract, part of which was a lease made in 1867, between the parties, and of which some of the defendants were guarantors. In the bill the plaintiff is alleged to be a corporation created under the laws of Illinois, and the defendants are alleged to be corporations created under the laws of Indiana and of Pennsylvania. We propose now to decide but two questions in the case: one as to the jurisdiction of the court, and the other whether this is a case properly cognizable in a court of equity, instead of a court of law.

There is another question which was somewhat argued by the counsel of the respective parties, but which I think ought to be reserved for the final hearing of the case, viz., whether the guaranty, made by some of the defendants, of the contract was *ultra vires*; that is, beyond the power of the companies respectively under their charters. It is sufficient as to this last point to say that I do not think there is anything in the case as now presented which would authorize the court to declare absolutely that these contracts of guaranty were *ultra vires*. That question will properly come up at the hearing.

§ 1365. *Where a contract and lease of a railroad has been performed for a time and then there has been a failure, a suit requiring restraining orders, etc., is properly brought in a court of equity.*

We think there can be no doubt that a court of chancery has jurisdiction in this case. The controversy grows out of a contract and lease made in 1867, containing various provisions, and relating to the operation of a railroad between Terre Haute and East St. Louis, by which a certain rental was to be paid, and various other stipulations were to be performed by the lessee, and which were guaranteed by some of the defendant railroad companies. The plaintiff asks that this contract shall be enforced as against these various parties. It was performed till 1878, when they failed to meet their engagements. The plaintiff asks that various restraining orders shall be made against some of the defendants to prevent injustice from being done to it, the application being made because of the contract, and of various relations which exist between the parties; for example, the holding by some of the defendants of certain bonds which are the subject of controversy, and in relation to which the plaintiff claims that the defendants should not be permitted, while they are under the obligations of the contract, to collect interest due upon coupons.

Now, these facts in themselves, thus briefly stated, we think constitute a case where there may not be a full remedy in a court of law, and where it may be proper for the plaintiff to apply to a court of chancery to have complete equity done. However, that which has been regarded by counsel as the most important question in the case, and which has perhaps been more fully argued

than any other, and to which the attention of the court has been particularly directed, is whether the circuit court of the United States for the district of Indiana, in which the bill was filed, has jurisdiction. That depends entirely upon the citizenship of the parties. It is conceded that there is no federal question necessarily arising in the case which *per se* would give jurisdiction to the court.

As the plaintiff is alleged in the bill to be a corporation created by the laws of the state of Illinois, and the defendants are alleged to be corporations created respectively by the laws of the state of Indiana and of Pennsylvania, it appears *prima facie* that there is no objection to the jurisdiction of the court. But there is a plea interposed to the bill in which it is alleged that under various acts of the legislatures of Illinois and Indiana there are two corporations; one the plaintiff, the St. Louis, Alton & Terre Haute Railroad Company, and another, the same company in name; and that there has been a consolidation of the two corporations created respectively by the states of Illinois and Indiana, and that they are inseparably connected together in such a way that the plaintiff is really a corporation as well of Indiana as of Illinois, and as some of the defendants are corporations of the state of Indiana, the court cannot have jurisdiction of the case. If this is so, then jurisdiction in the federal court does not exist, and we cannot hear the case or decide it upon its merits. I think we must assume, upon the allegations of the plea, that there are two corporations, one created by the state of Illinois and the other by the state of Indiana.

It will be borne in mind that while the larger portion of the railroad is within the territory of the state of Illinois, namely, from East St. Louis to the eastern boundary of the state, there is a portion of the line within the territory of the state of Indiana, from the western boundary of the state to Terre Haute, a distance of a few miles, and in order to control, own and operate the whole line of road from Terre Haute to East St. Louis it was necessary to obtain authority from both states. And accordingly authority has been given by both states. And it is alleged in the plea that under the act of 1861 (Private Laws of Illinois, 1861, 530) of Illinois, and the act of the same year of the state of Indiana, a corporation of Illinois and Indiana has been created; that a consolidation has taken place, and that it has become one corporation, owning, controlling and operating the road between East St. Louis and Terre Haute.

There is an allegation in the bill, that under and by virtue of the statutes of the states of Indiana and Illinois, "your orator was and is the owner of a railroad extending from the city of Terre Haute, in the county of Vigo, in the state of Indiana, to East St. Louis, on the Mississippi river, in the state of Illinois, with a branch to Alton in the said last named state, having the power to operate and maintain its said road under the laws of said states."

§ 1366. *Review of the authorities upon the question of citizenship and domicile of a corporation.*

The manner in which the supreme court of the United States has reached the conclusions which are now adopted as law in relation to the citizenship of corporations is well known to the profession, and was adverted to by the counsel on both sides in the argument of this case. That court held, in the first instance, that in order to give the federal court jurisdiction where a corporation was a party, on the ground of citizenship, it was necessary that all the corporators should be citizens of a particular state, and that the adversary

party should be citizens of another state different from that of the corporators, and if it turned out that any one of the corporators was a citizen of the same state as the adversary party, the jurisdiction of the court was gone. That rule, however, was afterwards changed, and the court finally reached this result: that it would assume as conclusively established that all the stockholders or shareholders of a corporation were citizens of the state which created the corporation.

So, while it was true that a corporation was not a citizen within the ordinary meaning of the word as used in the constitution and the laws of congress, still that the shareholders were citizens of the same state that created the corporation, and nothing could be heard in denial of that fact; the result of which was that by a fiction of law the corporation became a citizen of the state which created it. That was the state of the law when the case of *The Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286 (§§ 1351-52, *supra*), was decided, and which was much relied on by the counsel of the defendants. In that case there were two corporations created by the states of Indiana and Ohio (or rather there was a corporation created by the state of Indiana, and a license given to the Indiana corporation by the state of Ohio to operate a railroad and to own property in the latter state), and the suit was brought against a citizen of Indiana in the circuit court of the United States of that district. The declaration alleged "that the plaintiff was a corporation created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio." Objection was taken that the court had no jurisdiction of the case, on the ground that the defendant Wheeler was a citizen of Indiana, and that the plaintiff was also a citizen of Indiana; and the supreme court of the United States so held. Taney, chief justice, in giving the opinion of the court, says: "It follows from the decisions that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state;" and he holds that "such an action cannot be maintained in a court of the United States;" and he says, "in such a suit it can make no difference whether the plaintiffs sue in their own proper names or by the corporate names and style by which they are described." It will be observed that the chief justice in this opinion treats the plaintiff as a corporation of the state of Ohio and of Indiana. He says nothing about its being a corporation of Indiana, licensed by the state of Ohio. The case, then, decides this principle: that it is not competent for a plaintiff which is a corporation of two different states to bring a suit against a citizen of one of the states, where the declaration alleges the fact that the plaintiff is a citizen of both states, or a corporation created by both states, which, for the purpose of pleading, is the same thing. It must be conceded, I think, that, in principle at least, this case has not been strictly followed in subsequent decisions of the supreme court of the United States, and so it is not the duty of the court to follow it unless in a case within its terms.

The case of *The Railroad Co. v. Harris*, 12 Wall., 65 (CORP., §§ 1166-74), is perhaps only important in consequence of some observations made by the court upon the case of *The Ohio & Mississippi R. Co. v. Wheeler*, *supra*. The question in this case of *The Railroad Company v. Harris* was whether the defendant railroad company was a person, and could be sued within the District of Columbia under acts of congress which require that a defendant should be an

inhabitant of the state where the suit was brought, or should there be found. The corporation—the defendant against which the suit was brought—had been created by the state of Maryland, and authority had been given by the state of Virginia to extend the railroad into that state, and authority had also been given by congress to extend it into the District of Columbia, and the suit was brought in the District. The objection was taken that it was not competent to bring the suit there, because the defendant was not an inhabitant of the District, and was not there found. That objection was overruled by the court, although there was no act of congress in force that authorized a suit to be brought against a foreign corporation doing business in the District, and the court held that the railroad company had its *habitat* within the District of Columbia, so that process could be served upon one of the officers of the company.

The court says in its opinion: “We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one.” The court proceeds: “The jurisdictional effect of the existence of such a corporation, as regards the federal court, is the same as that of a copartnership of individual citizens residing in different states. Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad hoc* any property within its territorial jurisdiction.”

That is what has been done in this case, giving full scope, as claimed, to the allegations of the plea, namely: The state of Indiana has given authority to the corporation of the state of Illinois to hold property and to operate a railroad within the state of Indiana. “It is well settled,” the court further remarks, “that corporations of one state may exercise their faculties in another so far, and on such terms, and to such extent, as may be permitted by the latter. We hold that the case before us is in this latter category. The question is always one of legislative intent, and not one of legislative power or legal possibility. So far as there is anything in the language of the court in the case of *The Ohio & Mississippi R. Co. v. Wheeler* in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio.” The court seems to consider that the case of *The Ohio & Mississippi R. Co. v. Wheeler* was substantially a suit brought by a corporation of Indiana against a citizen of Indiana, and therefore the jurisdiction of the court could not be maintained.

The next case is *Railroad Company v. Whitton*, 13 Wall., 270 (§§ 585–588, *supra*). Whitton was a citizen of Illinois, and caused the transfer of a suit against the Northwestern Railroad Company from the state court to the circuit court of the United States for the district of Wisconsin, alleging that the defendant was a corporation created by the laws of Wisconsin, and a citizen of that state. In fact, the defendant, while it was a corporation created by the laws of Wisconsin, was also a corporation created by the laws of Illinois and of Michigan, and was a consolidated company under the authority of the three states, and operated a road throughout its entire length in the three states by the same board of directors and by the same officers, and, therefore, had as complete unity as it is possible for two or more railroad corporations created by different states to have.

The objection was taken that as Whitton was a citizen of Illinois, and the

defendant was also a citizen of Illinois, being a corporation created by that state, and consolidated with a corporation created by the states of Wisconsin and Michigan, in the nature of the case it was impossible to sever the corporations so as to give the federal court jurisdiction, and consequently it was true, as a matter of fact and law, that the plaintiff and defendant were citizens of Illinois, and so the court could not have jurisdiction. That objection was overruled in the court below, and that ruling was sustained in the supreme court of the United States. Field, justice, in giving the opinion of the court, said: "And here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and therefore is a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen, of Wisconsin by the laws of that state. It is not *there* a corporation or a citizen of any other state. Being there sued, it could only be brought into court as a citizen of that state, whatever its *status* or citizenship may be elsewhere."

So that when the suit was transferred to the federal court of Wisconsin, it mattered not that the defendant had a *status* and citizenship elsewhere, as in Illinois and Michigan, and that it was as a corporation a citizen of those states. It was in the suit in the state of Wisconsin to be treated only as a citizen of that state, and of course subject to the jurisdiction of the federal court as such, if the citizenship of the plaintiff authorized the suit to be transferred.

Muller v. Dows, 94 U. S., 444 (CORP., §§ 1574-79), was a case where a suit was originally brought in the federal court by several plaintiffs, one of whom was a citizen of the state of Missouri, against defendants, one of whom was a corporation of the state of Iowa; and if the corporation was a citizen of Missouri, of course there was no jurisdiction in the court. The defendant alleged, and it was conceded, that there were two corporations, one created by the laws of Iowa and another by the laws of Missouri, and that they were a consolidated company, and the objection was that, being a consolidated company, the Iowa corporation was merged or so connected with the Missouri corporation, that one of the plaintiffs could not maintain a suit in a federal court. It is to be observed that in these two cases last referred to there is nothing said about any license, but it is conceded that the corporations were, to all intents and purposes, separate, entire corporations, created by the laws of the respective states, and that under those laws the railroad company had become a consolidated company, operated throughout by virtue of those laws.

Mr. Justice Strong, in giving the opinion of the court, and I believe this is the last decision of the court upon this subject, says: "Still it is argued on behalf of appellants that the Chicago & Southwestern Railroad Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by the consolidation of the Iowa company with another of the same name chartered by the laws of Missouri, the consolidation having been allowed by the statute of each state. Hence, it is argued that the corporation was created by the laws of Iowa and of Missouri, and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the circuit court has no jurisdiction. We cannot assent to this inference." The court further says, "the laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further." The court then cites the case of *The Railroad Co. v. Whitton*, *supra*, which is, it must be admitted, substantially like the case then under consideration. Perhaps I ought to advert to the decision which was cited by

counsel in 51 Pennsylvania State, 228 (County of Allegheny v. Cleveland & Pittsburg R. Co.). That, however, was assumed to be like the case of Ohio & Mississippi R. Co. v. Wheeler, *supra*, and was decided upon the authority of that case.

§ 1367. *By the result of the authorities, the fact that two roads chartered by different states have been consolidated under the laws of those states will not prevent the corporation so formed from being sued or from suing as a citizen of one of those states.*

Now the state of the law upon this subject, as decided by the supreme court of the United States, appears to be this: That the fact that there are railroad corporations created by different states which have been consolidated under the laws of those states, and the railroad operated by virtue of that consolidation as one entire line of road, will not prevent the corporation from being sued in one of those states as a corporation created by the laws of that state, provided the plaintiff is a citizen of a state other than that of the state which creates the corporation. The only law that operates upon it is the law of its own state. If the corporation is a defendant, that is expressly decided by the court in the two cases last cited. Now if that is so as to the defendant, why is there any difference where the plaintiff as a corporation brings the suit?

If the defendant corporation, though consolidated with another of a different state, can be sued in the federal court in the state of its creation, as a citizen thereof, why can it not sue as a citizen of the state which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the federal court, if a corporation of another state, it is clothed with all the attributes of citizenship which the laws of that state confer, and the shareholders of that corporation must be conclusively regarded as citizens of the state which created the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the circuit court of the United States of Indiana, against a corporation of that state.

§ 1368. *The right of one corporation which has been consolidated with another to sue the other in a federal court.*

There is one question which we have considered, and about which, perhaps, there may be some doubt, and that is: It is said by the defendants that this is a contract made by the two corporations, the one of Illinois and the other of Indiana, and as a united corporation of both states, and therefore that there is a defect of parties because the corporation created by the state of Indiana, and which is consolidated with the Illinois corporation, is not made a party. It may be admitted that there is considerable force in the objection. The bill alleges, as before stated, that by virtue of the laws of the two states, the plaintiff owns and operates a railroad in the two states between Terre Haute and East St. Louis. What would be the effect if the Indiana corporation were made a party defendant in this case? We think that it would not oust the jurisdiction of the court, because, as already stated, the two corporations must be considered as distinct, the one having its *habitat* in Illinois, and the other in Indiana, and the shareholders in one being conclusively considered as citizens of Illinois, and of the other as citizens of Indiana. But it is to be borne in mind that the Illinois corporation, as such, and by virtue of the laws of Illinois, holds and controls the whole line of the road from East St. Louis to the east boundary of Illinois, and that the Indiana corporation has only a small

part of road between the *termini*, Terre Haute and East St. Louis, and there is no controversy existing between the two corporations. There is no relief sought by the Illinois corporation against the Indiana corporation. If the Indiana corporation were a defendant, it would be only a nominal party against which no relief was asked, and between which and the plaintiff there was no controversy whatever; so that, while I think it would have been competent for the plaintiff to have made the Indiana corporation, which owned a part of its line, a party defendant, I do not think it is absolutely necessary for it so to do, because I am inclined to think that under the allegations of the bill and on the facts as they are conceded and under the law, the Indiana corporation as such would be estopped by any decree rendered in this case, and, therefore, I hold that the fact that the Indiana corporation is not made a party does not prevent the court from proceeding with the case.

At the same time, it seems to me that it might be desirable, and I suggest it, therefore, to the counsel of the plaintiff, for an allegation to be put in the bill of the fact of the existence of the Indiana corporation, or an allegation might be inserted that the Illinois corporation represents, for all the equities sought by the bill, the Indiana corporation.

We hold, therefore, first, that a court of equity has jurisdiction of the case made by the bill. And, secondly, that the federal court of Indiana has jurisdiction of the case on account of the citizenship of the parties.

NASHUA & LOWELL RAILROAD CORPORATION *v.* BOSTON & LOWELL RAILROAD CORPORATION.

(Circuit Court for Massachusetts: 8 Federal Reporter, 458, 459. 1881.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.—This case was argued at the last October term of this court upon plea of the defendant to the jurisdiction of the court and an agreement of the facts. Judge Lowell, C. J., then took the papers for the purpose of decision, but soon afterwards was in some way led to suppose that the case had been adjusted between the parties, and so gave it no further consideration. Shortly before he went abroad he was informed that the case had not been adjusted, and he left it with me for determination, so that the decision now to be announced has been reached by myself alone. The Nashua & Lowell Railroad Company was separately chartered under the laws of New Hampshire and Massachusetts, and the two corporations so created were afterwards consolidated by law in both states. It has been settled by the supreme court of the United States that corporations created by different states and afterwards consolidated do not become a single corporation for all purposes; but while they may for some purposes be treated as a single corporation, yet for other purposes they remain separate and distinct corporations.

§ 1369. *A corporation chartered by two states may be a citizen of each, and may sue or be sued as a citizen of either.*

In this case it seems that the defendant corporation might go into New Hampshire, and there sue the plaintiff as a New Hampshire corporation in the federal court, although it could not bring such suit in the district of Massachusetts against the New Hampshire corporation, because no service upon the New Hampshire corporation as such could be got in this district, if for no other reason. It has been determined by Judge Lowell that in some cases non-resident corporations may be served with process from United States courts in

other districts than those in which they were chartered, and where they are found to be doing business or domiciled. But this rule would not, we suppose, extend to a case like the present. If the defendant could sue the plaintiff in the federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both states, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired. I am aware that a different conclusion seems to have been reached in a case (1 Am. L. Rev., 457) decided in the eastern district of Pennsylvania, but am not able to concur in the views taken in that case. The defendant's plea to the jurisdiction is therefore overruled.

CULBERTSON *v.* WABASH NAVIGATION COMPANY.

(Circuit Court for Indiana: 4 McLean, 544-548. 1849.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action is brought on a contract to improve the navigation of the Wabash river by various works specified, which were to be completed on the 1st of November, 1848, dated 24th of August, 1847. And it was provided that if, at any time, the party of the first part shall refuse or neglect to push the work in a manner that will warrant its completion within the time specified, or to do the same in a workmanlike manner and agreeably to said writing, the engineer may, at his discretion, declare said writing forfeited, which declaration of forfeiture should exonerate the defendants from all obligations and liabilities arising from said writing; and that one-sixth percentage on the whole work then due shall be forfeited to said defendants. And it was agreed that the decision of the engineer should be final. The right to change the contract was reserved in the company, and the plaintiff alleges that the contract was so changed as greatly to increase the labor, expenditure and materials, so that the work could not be completed within the time limited.

The defendant filed, 1. A plea to the jurisdiction of the court—that the defendant is not a corporation created by and transacting its business within the state of Indiana, but was constituted by the states of Indiana and Illinois. By the act of 13th January, 1846, made dependent upon the consent of Illinois. That the consent of Illinois was given 30th January, 1847, whereby the above company was incorporated, and that the company was organized under both laws. 2. That of the six directors, two of them reside in Illinois and are citizens of that state. 3. That the business of the company, the erection of certain works on the Wabash river, the banks of which are within the peculiar jurisdiction of each of said states, and the other part is within the concurrent jurisdiction of the said states. 4. That the directors have met as well in the state of Illinois as in the state of Indiana, for the transaction of their business, as its nature rendered it convenient. And that there is no particular place of business established for said company by the act or by the laws of the company. 5. That the stockholders are citizens of Indiana and Illinois. 6. That Culbertson, the plaintiff, is a stockholder. Replication that the president and secretary reside in Indiana—directors were there elected, and that Vincennes is the place of business, etc. Demurrer, etc.

The defendant filed a special demurrer to the declaration. And the plaintiff demurred to the sixth and seventh pleas, filed by the defendant. The declaration avers the plaintiff to be a citizen of Pennsylvania, and complains of the "Wabash Navigation Company, a citizen of the state of Indiana," etc.

§ 1370. *Suit may be brought against a corporation in the state in which its business is done, regardless of the citizenship of its stockholders.*

By the decision of the case in 2 How., 497 (§§ 1346-50, *supra*), the right of a corporation to sue in the courts of the United States, as a citizen of the state in which its business is done, is recognized, without regard to the citizenship of its stockholders. Under the prior decisions, jurisdiction was taken from the citizenship of the stockholders, which created embarrassment and deprived many corporations from suing in the courts of the United States. To give them the rights of citizens of the state where their business is done carries out, more perfectly, the intention of congress, by enabling citizens of different states to sue in the federal courts.

§ 1371. *A corporation chartered by two states is a citizen of the state first passing the act, and probably of the other also.*

The question now before us is one that has not, it is believed, arisen in any of the federal courts. It is argued that as the corporation derives its function from both states to accomplish an important work, on a river, which is the boundary of both, at least to a certain extent, that the courts of the United States cannot take jurisdiction, as the place of business of the corporation is in both states, and not, exclusively, in either. Illinois having assented to the work, and conferred on the corporation the necessary powers, so far as its jurisdiction is concerned, there can be no doubt as to the powers of the corporation. And the question is, as to the locality of the place in which the business of the corporation is done.

Under the joint act of two states, the powers conferred to be exercised for the benefit of both may be exercised in either. The act does not require the business to be done in either state, as regards the action of the directors; the work is to be done in both. But we are not now speaking of the manual labor required, whether it be on one side of the river or the other, but as to the power to make the contract, and to superintend the work. In this respect it would seem the claim of Indiana is paramount to that of Illinois. The act was first passed in Indiana, the company was organized in it, the president and secretary have constantly resided in Indiana, and a majority of the directors, and their principal business, at least, has been done at Vincennes, the residence of the president and secretary. And if, in one or more instances, the directors have met in Illinois to judge of a work to be constructed, it does not affect the general residence in Indiana. The books of the company are kept in Vincennes, in Indiana, which is the general place of meeting, and where the business of the directors is partially done. This, we think, is sufficient to make the defendant responsible to the jurisdiction of Indiana, and would enable the corporation to bring suit in that state. And we suppose that the corporation might also sue in Illinois. On the principle of comity a corporation may sue in a state other than that which creates the corporation; and in this case there is more than comity. There is a legal sanction to the corporation by the laws of Illinois. We think, therefore, that the jurisdiction of this court may be sustained in this case. The plaintiff is alleged to be a stockholder in the corporation, but this, we suppose, does not prevent him from suing the company under the contract. His interest in the company extends to the stock he has sub-

scribed and the consequent rights of one of the corporators; but he is individualized in the contract, and whilst he would be held, under it, individually responsible, he must have a remedy against the corporation for any failure on its part.

§ 1372. *A special demurrer will be sustained on account of uncertainty in the declaration.*

A special demurrer is filed to the declaration. After stating the power by the defendant to alter the contract, the declaration avers "that, after the making and delivery of said writing obligatory, the said defendant altered said specifications and greatly increased the amount of work to be done by said plaintiff under said contract, to wit, in the sum of \$5,000, and thereby so increased the amount of labor to be done and materials to be furnished by plaintiff and said Isaac, that they could not perform the same within the time specified therein." The cause of demurrer assigned is a want of certainty in the excuse for not performing the contract within the time limited. On a general demurrer we suppose the declaration might have been sustained, but it is not good on a demurrer where the causes are assigned. The specifications may be considered more a matter of form than substance. But it is proper that the defendant should have reasonable notice of the alterations in the contract by way of excuse, that the defendant may meet them by proof. In this respect, we think, the declaration is defective and that the demurrer must be sustained.

§ 1373. *A plea that answers only part of the declaration is demurrable.*

The sixth plea alleges that the defendant did not alter the contract so as to increase the amount of work to be done, so that the same could not be completed within the time limited. This plea answers only a part of the second count in the declaration. The plaintiff alleges that he was prevented from going on with the work. To this important allegation no answer is given. The plea, therefore, that the alterations did not so increase the labor of the defendant so that the same could not be completed within the time limited, answers only a part of the allegation in the count, and the plea is, therefore, defective. The demurrer to it is sustained. On the same ground the demurrer must be sustained to the seventh plea. That plea avers that the alterations mentioned in said second count did not require any extension of the time, but does not answer the other and important averment in the count, that the plaintiff was prevented from going on with the contract.

On application leave is given to plaintiff and defendant to amend their pleadings.

WILLIAMS v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

(Circuit Court for Missouri: 3 Dillon, 267-274. 1875.)

STATEMENT OF FACTS.—Motion by plaintiff to remand to the state court, on the ground of want of jurisdiction in the federal court. The statute relied on by plaintiff was a very general one, giving all railroad companies the right to purchase any part or all of any railroad which was wholly or in part in Missouri, provided that the roads connected at some point, and giving such purchasing railroad all the rights of companies within the state, and subjecting it to all their duties and liabilities "as fully as if incorporated in this state," etc.

Opinion by DILLON, J.

The question here presented is important, since it involves the right of the defendant, which runs and operates a long line of railroad within the state of

Missouri, to have access to the federal courts therein. We have given to the statute of Missouri, which controls its decision, and to the judgments of the supreme court of the United States having a bearing upon it, careful consideration, and our opinion is that the cause was properly removed into this court.

Upon the statute and facts brought to our attention it is plain that the defendant is a Kansas and not a Missouri corporation. If so, then it is, "for the purposes of federal jurisdiction, to be regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted." *Railroad Co. v. Harris*, 12 Wall., 65, 81; *Railway Co. v. Whitton*, 13 Wall., 270, 285 (§§ 585-588, *supra*); *Louisville, etc., R. Co. v. Letson*, 2 How., 497 (§§ 1346-50, *supra*). It is an admitted fact that the defendant company was originally organized under the incorporation laws of the state of Kansas, and hence is a Kansas corporation, and for jurisdictional purposes in the federal courts is considered to be a citizen of that state; but it is claimed by the plaintiff that the defendant, by virtue of its purchase of *part* of the line of the Tebo & Neosho Railroad Company, under the Missouri act of 1870, became, as to the line thus purchased, a corporation of the state of Missouri, and hence cannot litigate in the federal court therein with a citizen of the same state.

§ 1374. *The statute above described does not make the plaintiff a Missouri corporation.*

After an attentive examination of the statute of Missouri in question, under which the defendant purchased part of the line of the Tebo & Neosho Company, and constructed the road it operates in the state of Missouri, it is our opinion that the defendant did not thereby cease to be, even in the state of Missouri, a Kansas corporation, nor did it become, as to the road within the state of Missouri, a new and distinct corporation created by the laws thereof. There is no language in the Missouri act which re-incorporates it or which purports to *create* a new corporation; but the whole scope of that part of it conferring upon corporations of another state the power to purchase and operate roads in Missouri is, that such corporations retain their identity, and remain foreign corporations, but subject to taxation, and to all the duties, liabilities and provisions of the laws of Missouri, the same as corporations created under such laws. Among other things, they are to establish an office on the line of roads acquired under the act, "at which legal process and notice may be served *as upon railroad corporations of this state.*"

The case is strikingly analogous to that of *The Railroad Co. v. Harris*, 12 Wall., 65 (Corp., §§ 1166-74), in which it was held that similar legislation on the part of the state of Virginia, and of congress in respect to the District of Columbia, did not create a new corporation of the Baltimore & Ohio Railroad Company, originally chartered by the state of Maryland, and which constructed extensions of the road through Virginia, and within the District of Columbia. The case before us is unlike that of *The Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286 (§§ 1351-52, *supra*), in which a railroad company chartered by the laws of Indiana, and licensed by Ohio, sued a citizen of Indiana in the federal court of the latter state, and where the judgment of the supreme court was against the jurisdiction.

The object of the legislation of Missouri under consideration is obvious. Without the sanction of the legislature a domestic corporation of that state would have no power to sell out to another company all or part of its road and franchises, and a foreign company without such sanction would have no author-

ity to purchase and operate the road of a domestic corporation. The various provisions of the act show that the legislature designed to encourage the building of railroads and to facilitate the making of continuous or connected lines, by authorizing, as far as it could, its own companies to extend their roads into other states, and by conferring upon the companies of other states the right to lease or to buy, and to build and operate roads within its limits. But as above observed, it did not create such companies new corporations, but simply gave them, on the conditions stated, the rights, powers and immunities specified in the act. It is, therefore, unnecessary to consider in this case what would have been the effect on the jurisdiction of this court, if the legislature of Missouri had undertaken to make new or domestic corporations of the companies of other states coming into it, under the act of 1870. Nor have we any occasion to determine how far such a case would be controlled by that of *Wheeler* (1 Black, 287; §§ 1351–52, *supra*), nor how far the doctrines of that case have been modified by the subsequent decisions of the same tribunal. The motion to remand is accordingly overruled.

PARK BANK *v.* NICHOLS.

(Circuit Court for Illinois: 4 Bissell, 315, 316. 1869.)

§ 1375. *A corporation legally existing in one state may sue in the federal court of any other.*

Opinion by DAVIS, J.

STATEMENT OF FACTS.—It is objected that the Park Bank cannot sue in this court, because it is not a corporation created by the laws of the state of New York. So far as the right to sue is concerned, it can make no difference that the bank is authorized by congress instead of the legislature of New York. If it is created by law, has its lawful place of business in New York and nowhere else, and its corporators are citizens of the state, it can bring a suit in any circuit court of the United States outside of the state of New York. This was substantially decided by Chief Justice Marshall in *The Bank of the United States v. Deveaux*, 5 Cranch, 61 (§§ 1344–45, *supra*), but he held that it was a matter of proof whether all the corporators of the Bank of the United States lived in the state of Pennsylvania. This doctrine has been modified, and it is now held by the supreme court to be a presumption which cannot be rebutted, that if the corporation has a legal existence in the state, its individual members are citizens of the state.

There is no question but the Park Bank was authorized by congress to transact business in New York and nowhere else, and it therefore follows, as a legal presumption, that the shareholders of the bank are citizens of New York. If so, this suit can be maintained. Motion denied.

NORTHWESTERN FERTILIZING COMPANY *v.* TOWN OF HYDE PARK.

(Circuit Court for Illinois: 3 Bissell, 480–484. 1873.)

STATEMENT OF FACTS.—Complainant's charter was granted by the legislature of Illinois, in 1867. The object of the organization was the manufacture of a fertilizer from the offal of animals. The works of the company were located south of Chicago, and at the time of their erection were not within the corporate limits of defendant, but the corporate limits were subsequently extended

so as to include them. The defendant seeks to have the works abated as a nuisance, and this proceeding in equity was instituted to restrain defendant from passing certain ordinances, which, it is claimed, would interfere with complainant's privileges. Motion to dismiss for want of jurisdiction.

Opinion by DRUMMOND, J.

The question is, whether this court has jurisdiction of the bill.

§ 1376. *A charter granted to a corporation by a state is to be viewed to some extent as a contract between the state and the corporation.*

There is no doubt that, under the decisions of the supreme court of the United States, when a state creates a private corporation, and clothes certain persons with rights under the charter, that it may be to some extent a contract protected by the constitution of the United States. While there has been more or less of a struggle in relation to that, still it must be considered the settled law of the supreme court of the United States, and of course is the law of this court; and therefore the charter granted by the legislature of Illinois, in March, 1867, to the persons constituting the Northwestern Fertilizing Company must be considered in some respects in the nature of a contract which the legislature had no right by subsequent laws to interfere with. And where any constitutional right is sought to be affected by the legislation of a state, it is competent for congress in such case to clothe the federal courts with original jurisdiction, or with jurisdiction by transfer from the state courts.

§ 1377. *A corporation is a "person" entitled to protection under the act of April 20, 1871.*

The first section of the act of the 20th April, 1871 (17 Stat. at Large, 13), declares "that any person who, under color of any law, statute, ordinance, regulation, custom or usage of any state shall subject, or cause to be subjected, any person within the jurisdiction of the United States, to the deprivation of any rights, privileges or immunities secured by the constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage to the contrary notwithstanding, be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress."

One of the objections made to the jurisdiction of the court is that this law refers to *persons*, and it is said they must be natural persons, and that — this being a statute passed under the provisions of the fourteenth amendment of the constitution — congress did not intend to include corporations by this language; and this objection is certainly not without force. But I am inclined to think that it ought not to prevail, provided certain facts appear in the case to show that they are persons who have "rights, privileges or immunities secured by the constitution," and which are affected "by color of any law, statute, ordinance, regulation, custom or usage of any state." It seems to me that the fact that these persons hold their rights or property under the name of a corporation cannot deprive them of the rights and remedies which the constitution and the law sought to confer. It is true that the supreme court of the United States has decided, in the case of *Paul v. Virginia*, 8 Wall., 168 (Const., §§ 1052–59), that where the constitution declared that the citizens of each state shall have the same immunities and privileges as the citizens of the several states — that is to say, there should be no law of discrimination made by any state against the citizens of another state — that meant persons and not corporations, and therefore that it did not prevent a state from declaring that a corporation of another state should not have the right to transact business except on special terms, as

by obtaining a license. In that case, and in the one that went up from this state, *Ducat v. Chicago*, 10 Wall., 410, the state imposed upon a foreign corporation certain restrictions as conditions precedent to the transaction of business in the state, and the corporators endeavored to protect themselves under the principle that they were, as a corporation, a citizen of the United States, and therefore they had the same immunities as the citizens of the states which attempted to impose penalties or burdens upon them different from those that were imposed upon the citizens of those states. In that case, the court held that these acts of the state were within the authority of the constitution, and that they did not violate that provision, because the language referred to citizens—to persons, and not to corporations; and although it was true that, for the purpose of the jurisdiction of the federal courts, a corporation was a citizen, still it was not true that they were protected in the same way precisely as a natural person who was a citizen of another state.

It is to be observed that the question in this case is whether the court has jurisdiction in order to protect the rights of the corporation and its property, and therefore the rights, privileges and property of the persons who constitute the corporation. It is then a question of jurisdiction here, and in the same way as it was a question of jurisdiction whether a corporation was a citizen within the meaning of that term in the constitution, so as to authorize the federal courts to take jurisdiction in controversies between a corporation and an individual. It seems to me it would be “sticking in the bark” to hold that the rights of a person in relation to his property should be protected under these provisions of the constitution and law where he was simply an individual, and the rights of the same person as to property, as a member of a corporation, should not also be protected. Why, for example, if a corporation as such, under color of any law, statute, ordinance, regulation, custom or usage, should subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the constitution of the United States, should not the individual have redress against the corporation? And yet the language of the law is “a person,” and not a corporation. Why should a party be protected if the wrong was done by a person, and not protected if it was done by a corporation, where it is a question as to the jurisdiction of a court? Why, in other words, cannot the court treat a corporation, if that does the wrong, as a person, precisely as the courts have always treated a corporation as a citizen, for the purpose of maintaining jurisdiction where rights are affected? It seems to me if the bill shows that the rights of the corporators are affected within the terms of this law they may seek the redress which is there pointed out. They claim that, as individuals constituting the corporation, they possess certain privileges secured by the constitution of the United States, of which they are to be deprived, or which are to be affected under color of a law, statute, ordinance, regulation, custom or usage, within the terms of this provision of the law, and, inasmuch as I think where if the wrong was done *by* a corporation there would be a remedy under the statute, I also think that where the wrong is done *to* the corporation (or the individuals of which it is composed), the same right is given to the corporation. See sec. 2, Act of February 25, 1871; 16 Stat. at Large, 431.

The statute of April 20, 1871, declares that such proceedings are to be prosecuted in the several district or circuit courts of the United States with and

subject to the same rights of appeal, review upon error, and other remedies provided in like cases in said courts. I think, therefore, upon a proper showing, a bill may be maintained in this court by the Northwestern Fertilizing Company.

Motion to dismiss overruled. (a)

FARGO *v.* THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

(Circuit Court for Indiana: 6 Federal Reporter, 787-794. 1881.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—This is a suit in equity brought by William G. Fargo, a citizen of the state of New York, individually, and as president of the American Express Company, against the Louisville, New Albany & Chicago Railway Company for an injunction and other relief. The grounds of jurisdiction assigned in the bill are: (1) That the right of the American Express Company to sue and be sued in the name of its president is a franchise conferred upon it by the legislature of New York, which, by comity, follows it into other states where it is permitted to do business; also, that the president is a natural person and a citizen of the state of New York, and the defendant is a citizen of the state of Indiana. (2) That if it be held that the complainant, as such president, is not entitled to maintain the suit under the laws of New York, then he brings the suit, not only in his own name and behalf individually as a shareholder in the company, but also in behalf of such of the other numerous shareholders not citizens of the state of Indiana as shall come in and be made parties to the suit, and share in the expense thereof.

The defendant's objections to the jurisdiction of the court are that the American Express Company is not a corporation, but a mere voluntary association, with no existence as an entity separate from the existence of its members; that, not being a citizen in the sense in which a corporation is, it can sue only with the names of all its associates, who, upon the face of the bill, must appear to be citizens of states other than the state of Indiana; that the New York statutes, which, it is claimed, authorized this suit to be brought in its present form, permit the president to sue only when all the stockholders can sue, and that all the stockholders of this company could not sue, because they are all of the same class, and some of them are citizens of the same state as the defendant; that the laws of New York, which confer upon this company certain corporate franchises, have no extraterritorial effect, and that the jurisdiction of this court is not of comity, but of constitutional right. The judicial power of the United States is extended by the constitution to "controversies between citizens of different states," and by the judiciary act jurisdiction is conferred upon the circuit courts of the United States when "the suit is between a citizen of the state where the suit is brought and a citizen of another state." It is now settled that for the purpose of federal jurisdiction corporations are regarded as citizens of the states where they are created, and no averment as to the citizenship of the members elsewhere will be permitted.

§ 1378. *Joint stock companies for purposes of jurisdiction regarded as citizens of the state under the laws of which they are organized.*

Is the American Express Company, which is a joint stock company, organized under the laws of New York, a citizen in the same sense and for the same purpose? In chapter 258 of the laws of 1849 of the state of New York, and in subse-

(a) For the opinion in this case in the supreme court, see CORPORATIONS, §§ 1287-1291.

quent amendatory acts, joint stock companies may sue and be sued in the name of the president and treasurer when the nature of the cause of action is such that the suit might be maintained by or against all the shareholders. Such companies are endowed with perpetual succession—dissolution not resulting from changes in membership produced by death or otherwise. A pending suit by or against the president or treasurer of the company is not abated by the death, resignation or removal of such officers; and a judgment against the president or treasurer as such is not a lien upon their individual property, but execution is levied upon the property of the company only, the shareholders being liable individually after an ineffectual effort to thus collect the debt from the company. These are privileges that are not enjoyed by natural persons or partnerships. While these companies have no common seal, it is difficult, in other respects, to distinguish them from corporations. They are organized under general laws very much as incorporations are now usually organized. Their stock is divided up into shares and sold on the stock boards just as the stock of corporations is divided up and sold.

§ 1379. *Principles upon which the attributes of joint stock companies are to be determined. When a corporation de facto.*

Corporations are artificial persons — ideal creatures of the state — and so are New York joint stock companies. It is of no consequence that in the statutes under which these companies are organized they are called “unincorporated associations.” In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint stock company, it is none the less a corporation for being called something else. Section 3, article 8, of the constitution of New York declares that “the term corporation, as used in this article, shall be construed to include associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue, and shall be subject to being sued, in all courts in like cases as natural persons.” It is urged, however, by counsel for the defendant that the statute which confers the right upon these companies to sue and be sued in the name of the president or treasurer relates to the remedy only, and that it can have no extraterritorial effect.

Experience demonstrated the usefulness of these institutions in carrying on trade and business, and convenience required that they should be allowed to sue and be subject to suit in the name of an individual who should represent the companies as distinct from the individuals composing them. The right of such companies to sue, and of others, including their own shareholders, to sue them, could not be acquired by agreement between the associates. In England, by an act of parliament, a public officer is designated to represent the individuals composing joint stock companies in the courts, both as plaintiff and defendant, and a judgment taken against him, in his representative capacity, binds only the property of the company. In New York, where the same necessity was felt for a representative of joint stock companies in litigation both by and with them, the legislature provided that suits might be brought by and against such companies in the name of the president or treasurer. Aside from considerations of convenience, it would be a practical denial of justice to hold that such organizations, representing as they do large interests, with numerous and ever-changing shareholders, can sue and be sued only in the names of all their associates, as in the case of partnerships. It is only by comity that a cor-

poration which has been created by one state is permitted to carry on its business in other states, and there sue in its corporate name; and it is not easy to assign a reason why the same rule of comity should not apply in favor of joint stock companies, which in character are not unlike corporations.

In 1855 the legislature of Indiana passed an act (1 Davis, 466) relating to express companies. At that time, and ever since, the express business in this state has been done by foreign companies organized as this company was. By this act it is declared that all such companies (and clearly foreign companies are contemplated), before entering upon business in any county in this state, shall file in the clerk's office of that county a statement of their membership, the amount of capital invested in their business, and an agreement that service of process upon any agent of the company shall be deemed good service on the company. Here was a recognition by the state of the existence of express companies like the American, with all the privileges which they enjoyed where organized, one of which was the right to sue in a representative or common name.

The legislature of Massachusetts passed a statute which imposed upon each fire, marine, and fire and marine insurance company, incorporated or associated under the laws of any government or state other than one of the United States, a tax of four per cent. upon all premiums charged or received on contracts made in that state for insurance of property. With this statute in force, the state of Massachusetts filed a bill in its supreme judicial court against the Liverpool & London Life & Fire Insurance Company to collect a tax of four per cent. on its premiums upon contracts made in Massachusetts, and to restrain the company from doing further business until the tax was paid. Payment of the tax was resisted on the ground that the defendant was an association of natural persons, under certain deeds of settlement and especial acts of parliament, and not a corporation. In these acts of parliament, conferring privileges on the company, it was declared not to be the intention to make it a corporation. The supreme court of Massachusetts gave a decree against the company. In affirming the case on appeal the supreme court of the United States held (10 Wall., 566) that, as the law of corporations is understood in this country, the Liverpool & London Life & Fire Insurance Company was exercising corporate franchises in Massachusetts, and that it was liable as a corporation to pay the tax under the statute of that state.

In the case of *Westcott v. Fargo*, 61 N. Y., 542, it was held that under section 3, article 8, of the constitution of New York, and under the legislation of that state, already alluded to, the president of the American Express Company was to be deemed a corporation sole for the purpose of suing and being sued in the courts of that state. The reasons which induced the supreme court to hold that, for the purposes of federal jurisdiction, corporations are to be regarded as citizens of the states whose creatures they are, call with equal force for a similar ruling in favor of joint stock companies which are organized under the laws of New York. It is no less convenient for the public than it is for these companies that they should be allowed to sue and be sued in the name of the president or treasurer. If they are not allowed the privilege of thus suing they cannot be thus sued. The American Express Company has a capital stock of \$18,000,000, with more than three thousand shareholders. Its right to sue and its liability to suit in the name of its president or treasurer is a franchise conferred upon it by the laws of New York, which by comity should and does follow it into other states, and William G. Fargo, who brings the suit as president, is a citi-

zen of New York, and the defendant is an Indiana corporation and a citizen of that state.

For these reasons I think the suit is properly brought, and without deciding other questions which were argued by counsel, the motion to dismiss for want of jurisdiction is overruled.

§ 1380. Depends on citizenship of members.—The right of a corporation to litigate in the courts of the United States depends on the citizenship of its members, and a body corporate cannot as such be a citizen within the meaning of the constitution. *Hope Ins. Co. of Providence v. Boardman*,* 5 Cr., 57.

§ 1381. In the following cases, it was said by one or more judges in dissenting opinions, that a corporation cannot from its nature be a citizen of any state, and therefore, when the jurisdiction of the court depends on the allegation that the corporation is a citizen of any state, the jurisdiction will fail: *Philadelphia, etc., R. Co. v. Derby*, 14 How., 488; *Rundle v. Delaware & Raritan Canal Co.*, 14 How., 97; *Salmon Falls Manuf. Co. v. Goddard*, 14 How., 457 (CONTRACTS, §§ 1762-67); *North. Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How., 249; *State Bank of Ohio v. Knoop*, 16 How., 405 (CONST., §§ 2246-53); *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How., 443 (CONST., §§ 2254-65).

§ 1382. Although in a question of jurisdiction it was held in the *Bank of the United States v. Deveaux*, 5 Cranch, 61, that the court might look into the residence of members of a corporation, and, if they are all members of different states from the other party to a suit, might allow the corporation to sue in the federal courts, yet this referred only to jurisdiction. As to ascertaining the substantial rights of parties in a suit against a corporation, the corporation is considered an inhabitant of the state in which it is incorporated. *Bank of Augusta v. Earle*, 13 Pet., 586 (CORP., §§ 1123-35).

§ 1383. In the following cases it was held that a federal court has no jurisdiction of a suit against a corporation, if any of the corporators are citizens of the same state with the plaintiff: *Kirkpatrick v. White*,* 4 Wash., 595; *Bank of Cumberland v. Willis*,* 3 Sumn., 472; *Commercial & Railroad Bank v. Slocomb*,* 14 Pet., 60; *Breithaupt v. Bank of Georgia*,* 1 Pet., 238.

§ 1384. Presumption as to citizenship of members.—The members of a corporation are, for purposes of jurisdiction, conclusively presumed to be citizens of the state which granted the charter. *Steamship Co. v. Tugman*, 16 Otto, 120; *Boom Co. v. Patterson*, 8 Otto, 407. And it may therefore sue or be sued by a citizen of another state in the federal courts. *Boom Co. v. Patterson*, 8 Otto, 407.

§ 1385. The rule reaffirmed that a corporation, while not strictly a citizen of the state in which it is incorporated, is conclusively presumed to be composed of citizens of that state. An allegation that the corporation is a body corporate by the laws of a state is a sufficient allegation of the citizenship of its members, and if the plaintiff, resident in another state, sues the corporation, the federal courts will take jurisdiction of the case. *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 324 (CONTRACTS, §§ 555-62).

§ 1386. Depends on citizenship of corporation.—For the purposes of an action at law a corporation is a citizen of the state which created it. *Railway Co. v. Whitton*, 13 Wall., 270 (§§ 585-588).

§ 1387. A corporation established by and in a state, and doing business there, is to be deemed a citizen of the state; and for the purposes of jurisdiction, the citizenship of the corporators is immaterial. *Greeley v. Smith*, 3 Story, 78.

§ 1388. A corporation is a citizen within the meaning of the twelfth section of the federal judiciary act, entitling a party to a suit in a state court to remove the suit to a federal court in certain cases. *Barney v. Globe Bank*, 5 Blatch., 113.

§ 1389. When a case is brought by a citizen of one state against a corporation chartered in another, in a federal court, the allegation that the defendant is a corporation in such state by a law of that state is sufficient to establish the jurisdiction. From this view Daniel, J., dissenting, says a corporation cannot be a citizen of any state so as to give jurisdiction. *Philadelphia, etc., R. Co. v. Quigley*, 21 How., 214, 215.

§ 1390. When the defendant is a corporation chartered by the legislature of a different state from that in which the plaintiff lives, the federal courts have jurisdiction of the case, and it is immaterial that a stockholder of the corporation lives in the same state as the plaintiff. *Greeley v. Smith*, 3 Story, 77.

§ 1391. When a suit in equity is brought in the circuit court of the United States, and a corporation which is a necessary party to the bill is not made a party because, being incorporated by the laws of the state where the plaintiff resides, its joinder would oust the jurisdic-

tion of the court, the court will not entertain jurisdiction of the case. *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How., 244.

§ 1392. When a record shows averments by the plaintiff that he is a citizen of one state and the defendant a corporation chartered by the laws of another state, a *prima facie* case of jurisdiction for the circuit court of the United States is made out. *Fremont v. Merced Mining Co.*, McAl., 268.

§ 1393. An allegation as to defendant that "the Covington Drawbridge Company, of Covington, is a corporation and citizen of the state of Indiana," is sufficient for jurisdictional purposes. *Covington Drawbridge Co. v. Shepherd*,* 21 How., 112.

§ 1394. In suits in the federal courts, where the jurisdiction depends on the citizenship of the parties, and one is a corporation, it is not enough to allege the corporation to be a *citizen*. It should be alleged that the company is "a corporation under the laws of" the state where it is chartered. When this allegation is made, it is conclusively presumed by law that the stockholders are all citizens of the state where the charter is given. *Muller v. Dows*, 4 Otto, 445 (CORP., §§ 1574-79).

§ 1395. Estoppel as to citizenship.—If a body of citizens of a state assume to act as a corporation of that state, have offices and principal officers in that state, execute bonds and mortgages including property in that state, and reciting and showing a charter and legislation of that state as part of its authority to do those acts, *semble* it is estopped by these acts to deny its citizenship in that state when the question of jurisdiction depends on that fact. *Blackburn v. Selma, M. & Memphis R. Co.*, 2 Flip., 530 (CORP., §§ 1179-86).

§ 1396. Suable only in state where chartered.—When a defendant corporation is sued in the United States circuit court in another state from that in which the corporation is organized and does business, the case will be dismissed for want of jurisdiction. *Northern Indiana R. Co. v. Michigan Central R. Co.*, 5 McL., 446.

§ 1397. A corporation chartered by the laws of a state is a citizen of that state, within the meaning of the eleventh section of the judiciary act. The fact that it does business in another state, and that by the laws of that state a certain mode of service upon it is prescribed, does not make it a citizen of that state. *Hatch v. Chic., R. I. & Pac. R. Co.*, 6 Blatch., 111.

§ 1398. *Union Pacific R. Co.*—A corporation exists only in the state in which it is incorporated and can be sued there only. The *Union Pacific R. Co.* did not extend its liability to suit by accepting its charter in the act of congress, providing that it may sue and be sued in all courts of law and equity within the United States. *Lathrop v. Union Pac. R. Co.*,* 1 MacArth., 237.

§ 1399. Suable in any state where it does business.—A corporation of one state, doing business in another, may be sued where its business is done, if the laws make provision to that effect. *Railroad Co. v. Koontz*, 14 Otto, 10.

§ 1400. The act of March 2, 1831, licensing the *Baltimore & Ohio Railroad Company*, a corporation of Maryland, to extend a branch into the District of Columbia, made the company, although a foreign corporation, subject to suits in the courts of the District; and it seems that in any case where a foreign corporation does business in a state, other than that of its origin, it thereby consents to be sued in the courts of that state. *Railroad Co. v. Harris*, 12 Wall., 65 (CORP., §§ 1166-74).

§ 1401. When a foreign corporation is doing business according to law in the district within which it is sued, it is "found" there so as to be suable, whether the legislation under which it so does business incorporates it within the district, or is merely a license to do business in some place within the district. *Blackburn v. Selma, M. & Memphis R. Co.*, 2 Flip., 535 (CORP., §§ 1179-86).

§ 1402. A corporation chartered by one state, and doing business there and in another state also, is "found" in the latter state, so that it can be served with process there, out of the federal courts. The legislation of the state relative to the mode of service on foreign insurance companies does not imply that similar legislation is necessary in order to serve process on other foreign corporations. *Wilson Packing Co. v. Hunter*, 8 Biss., 430.

§ 1403. Service of process on foreign corporation.—A federal court of the southern district of New York cannot acquire jurisdiction over a Connecticut corporation by service of process on one of its officers in the district where the court is sitting. *Decker v. New York Belting and Packing Co.*,* 11 Blatch., 76.

§ 1404. An insurance company doing business in a state other than that of its domicile may be sued in that state, and process may be served upon its agent there who receives risks, signs policies and transacts the ordinary business of an insurance agent, though in the absence of statutes authorizing such suits or such method of service. *Moch v. Insurance Co.*, 4 Hughes, 61 (§§ 501-507).

§§ 1405-1419. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1405. Although authorities have held that a corporation cannot be found for service of process outside of the state of its creation, yet the question has been so definitely settled otherwise as to be beyond discussion, and service in a suit in the federal courts may be made upon a duly authorized agent. *Runkle v. Lamar Ins. Co.*,* 2 Fed. R., 9.

§ 1406. — agent authorized by state law to accept service.— When a state law provides that service on an insurance agent shall be service on the corporation, though the corporation is organized and chartered in another state, the federal court will uphold the jurisdiction acquired by such service. *French v. Lafayette Ins. Co.*, 5 McL., 465.

§ 1407. Foreign insurance companies doing business in Ohio under a license requiring them to assent to service upon their agents may be sued in the federal court by such service, as well as in the state courts, and this whether or not the particular causes of action in question were created by the action of these agents. *Mohr & Mohr Distilling Co. v. Insurance Cos.*,* 12 Fed. R., 474.

§ 1408. The federal courts cannot acquire jurisdiction over a corporation created by the laws of another state by service of process upon one of its officers within the district. *Pomeroy v. N. Y. & New Haven R. Co.*,* 4 Blatch., 121.

§ 1409. It is not material in such case that such corporation has permission to extend its road into the state in which the court is held, and that the laws of such state make it subject to process from the state courts, to be served upon its agents. *Ibid.*

§ 1410. A statute of New York authorized the defendant, a Connecticut corporation, to act within its limits, and enacted that it should be liable to be sued like any domestic corporation, and that service on its agents or officers should be sufficient. *Held*, that the United States circuit court for a New York district could acquire no jurisdiction of a suit against the corporation by service on its agent appointed under the New York statute to receive service there. *Ibid.*

§ 1411. The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States; hence a federal court cannot get jurisdiction of a corporation not a citizen of the state in which its district lies by service on an agent appointed by the corporation to receive process from the state courts, under a state statute licensing the corporation on condition of such appointment. *Southern & Atlantic Tel. Co. v. New Orleans M. & T. R. Co.*,* 2 Cent. L. J., 88.

§ 1412. A municipal corporation may be sued in the federal courts by a citizen of another state, for it is a citizen of the state in which it exists, so far as is necessary for purposes of jurisdiction. *McCoy v. Washington County*, 3 Wall. Jr., 385.

§ 1413. May sue in another state.— A corporation may sue in the federal courts outside the state or territory within which it was incorporated. *Insurance Co. v. The "C. D., Jr."*, 1 Woods, 73.

§ 1414. Where one of the defendants is a resident of the same state as the plaintiff corporation.— Where a bill in equity in the United States circuit court is brought by a corporation existing in one state against several defendants, one of whom is a corporation of the same state, the court cannot entertain jurisdiction. *Ketchum v. Farmers' Loan and Trust Co.*,* 4 McL., 1.

§ 1415. Suit by corporation in a state whose laws forbid it to remove suits to federal courts.— When an insurance company chartered in one state is allowed to do business in another state on terms of being there amenable to the state courts, though it may forfeit its right to remove a case brought against it in the state court to a federal court, yet it retains its right as a foreign corporation to sue a resident of that state in the federal courts. *Metropolitan Life Ins. Co. v. Harper*, 3 Hughes, 271.

§ 1416. Suit in state where it is prohibited from doing business.— A statute forbidding foreign corporations from transacting business within the state except under certain conditions would include a national bank. Such a statute, however, should not be construed to forbid a corporation from maintaining a suit within the state, and if it were so construed it would be ineffectual, as jurisdiction in such case is given by congress. *Orange Nat. Bank v. Traver*,* 7 Saw., 210.

§ 1417. A bill in equity for the distribution of assets may be sustained in the federal courts by a stockholder of a bank incorporated in another state and dissolved by the law of that state for breach of its charter. *Bacon v. Robertson*, 18 How., 482 (CORP., §§ 1446-49).

§ 1418. Suit against corporation by stockholders residing in other states.— The circuit court for Indiana has jurisdiction of a suit brought by stockholders of an Indiana corporation who are citizens of other states, against the state treasurer and the corporation to enjoin the collection of an illegal tax; and, although the corporation appear as defendants, the court may give them such relief as may be just. *Paine v. Wright*,* 6 McL., 395.

§ 1419. Consolidation of corporations of different states.— Although two corporations may be joined into one consolidated company by statutes of the two states where they are

incorporated, yet, for jurisdictional purposes in the federal courts, either of the incorporators is considered a citizen of the state in which it was incorporated, and of that alone. *Muller v. Dows*, 4 Otto, 447 (CORP., §§ 1474-79).

§ 1420. By a legal fiction, all the incorporators of a corporation established by a state legislature are conclusively presumed to be citizens of that state; and if a railroad company, which has been chartered separately in several states, is afterwards chartered in those states as a single consolidated company, the corporation established thus by each state is, for jurisdictional purposes, a citizen of that state. *Uphoff v. Chic., St. L. & New Or. R. Co.*, 5 Fed. R., 548.

§ 1421. **Incorporation in several states.**—When a company is incorporated in two states, a citizen of one of the states may sue the corporation in the federal court in the other. *City of Wheeling v. Baltimore*, 1 Hughes, 96.

§ 1422. When a citizen of one state brings a bill in equity against two corporations, composed of the same individuals, but incorporated, one in the state in which the plaintiff lives, the other in a different state, the bill must be dismissed as to the former for lack of jurisdiction, but may be maintained against the latter. *Vose v. Reed*, 1 Woods, 649.

§ 1423. When a railroad corporation is chartered in three states, and is sued by an inhabitant of one of those states in another of those states, and is described in the suit as incorporated in the state in which it is sued, the suit may be removed into a federal court under act of congress of March 2, 1867, for the corporation is in that suit a citizen of the state in which it was sued, although it is likewise incorporated in other states. *Railway Co. v. Whitton*, 13 Wall., 283 (§§ 585-588).

§ 1424. When a corporation is incorporated by acts of different states it is, for purposes of suit, an inhabitant of any of those states; but when a corporation is incorporated in one state, and a statute of another state recognizes it as already existing by the laws of the first state, and merely extends to it similar powers to those given it in the state where it was incorporated, such a statute must be construed only as a license enlarging the field of operations, and the corporation is not, for purposes of jurisdiction, a citizen of the second state, but may be sued in the circuit court by a citizen of that state. *Missouri, Kan. & Tex. R'y Co. v. Texas & St. L. R'y Co.*, 10 Fed. R., 502 (CORP., §§ 1552-55).

§ 1425. When a corporation, chartered and organized originally in one state, afterwards secures legislation in other states, it is a question of legislative intent whether such legislation makes the corporation a citizen of those states, or merely licenses it to do business in them. When the original charter is simply adopted by the other states, the corporation is, for purposes of jurisdiction, a citizen of those states, although it may not have organized in any of them. *Blackburn v. Selma, M. & Memphis R. Co.*, 2 Flip., 536 (CORP., §§ 1179-86).

§ 1426. When a municipal corporation of one state holds stock in a railroad corporation, originally chartered by another state, but whose charter has been confirmed by the state in which the municipal corporation is situated, that municipal corporation may sue the railroad corporation in the United States circuit court for that circuit. *City of Wheeling v. Mayor of Baltimore*, 1 Hughes, 96.

§ 1427. An inhabitant of Alabama brought suit in a state court of Alabama against a railroad company for injuries. The company was originally incorporated in Tennessee, but an act was passed by the Alabama legislature incorporating the company in Alabama. The railroad company removed the suit to the federal circuit court. It was there held that the company was a citizen of Alabama, for jurisdictional purposes, as well as of Tennessee, and that the federal court had no jurisdiction of the suit. *Copeland v. Memphis & Charleston R. Co.*, 3 Woods, 657.

§ 1428. The circuit court has no jurisdiction of a suit brought by a citizen of one state against a railroad company which, although originally incorporated in a different state, yet has by statute been adopted by the state in which the plaintiff resides, if the statute is more than a mere license to the company, as a corporation of another state, to do business in the state. It seems that if the plaintiff shows by his pleadings that he is suing a corporation established by another state, the court may take jurisdiction. *Uphoff v. Chicago, St. L. & N. O. R. Co.*, 5 Fed. R., 547.

§ 1429. **Defendant corporation operating road in plaintiff's state.**—When suit is brought in a state court by a citizen of one state against a railroad corporation of another state, but which has leased a line of railway from a railroad company of the state in which the plaintiff resides, and is operating the same under the leases and by virtue of the franchise granted to the lessor corporation, these facts do not constitute any bar to a petition by the defendant corporation for removal of the cause to the circuit court of the United States. *Railroad Co. v. Koontz*, 14 Otto, 10.

§ 1430. **Mandamus—Union Pacific Railroad Company.**—Under the act of March 3, 1873, the proper circuit court of the United States has jurisdiction of all cases of *mandamus*

against the Union Pacific Railroad to compel it to operate its road according to law. But there must be service on the company to give the court jurisdiction, or, unless there is a voluntary appearance, the proceedings will fail. *Quære*, whether under these circumstances the circuit court for the district of Iowa can acquire jurisdiction over the company. *Hall v. Union Pacific R. Co.*, * 6 Ch. Leg. N., 307.

§ 1431. **Waiver of objection to jurisdiction.**—A corporation does not waive an objection to the jurisdiction by appearing by attorney and pleading to the jurisdiction. *Decker v. N. Y. Belting and Packing Co.*, * 11 Blatch., 76; *Cadle v. Tracy*, * 11 Blatch., 101.

§ 1432. If a corporation of a state other than that of the plaintiff is sued in the circuit court in a district which does not include the state in which it is incorporated, if the corporation voluntarily appears in the case, this appearance gives jurisdiction over the corporation where there are other parties resident within the district who are sued. *Blackburn v. Selma, M. & Memphis R. Co.*, 2 Flip., 531 (CORP., §§ 1179-86).

§ 1433. When a suit is brought in a state court against a corporation which was incorporated in another state, and the case is then removed by the defendant corporation to the circuit court of the United States, the corporation thereby waives its right to object to the jurisdiction of the circuit court, on the ground that it is not resident or found within the district of the court. *Winans v. McKean R. and Nav. Co.*, 6 Blatch., 218.

§ 1434. If a defendant corporation, sued in the United States circuit court, in a district where it was not found, appears and files an answer, it waives its privilege and is amenable to the jurisdiction of the court. *Kelsey v. Pennsylvania R. Co.*, 14 Blatch., 89.

§ 1435. When a railroad company has obtained acts of incorporation in two adjoining states, if both the corporations are sued in the circuit court of the United States for the district within which one of them is incorporated, and both appear and file a joint answer, the court has jurisdiction of both, for the one which was not incorporated within the district of the court has waived the objection to the jurisdiction by appearing and answering. *Wilmer v. Atlanta & Rich. Air Line R'y Co.*, 2 Woods, 455 (CONV., §§ 1405-9).

§ 1436. **Removal to federal court.**—Where a cause is removed into the circuit court, under the twelfth section of the judiciary act, the court has jurisdiction of the suit, although it could not have taken original jurisdiction of the action owing to the fact that the defendant is a foreign corporation. *Bliven v. New England Screw Co.*, 3 Blatch., 111.

§ 1437. The suit was originally brought in the New York state court against the defendant, a Massachusetts corporation; and service obtained by attachment and publication. The defendant entered an appearance and filed a petition for removal into the federal court under section 12 of the judiciary act. On motion in the federal court to remand, it was held that the proceeding in the state court was a suit within the meaning of the act, and that the defendant having voluntarily appeared, it was no objection to the removal that the defendant could not have originally been sued in this court. *Barney v. Globe Bank*, 11 Am. L. Reg., 221; 5 Blatch., 110.

e. National Banks.

[See BANKS, NATIONAL, VIII.]

SUMMARY — *Suits out of the district*, § 1438. — *Is a citizen*, § 1439. — *Right to sue out of district not excluded*, § 1440. — *Suits within district*, § 1441; *sues under its charter*, § 1442. — *May sue as a citizen*, §§ 1443-44. — *Location*, § 1445. — *May sue as plaintiff*, § 1446. — *Are residents of their district*, § 1447. — *Not migratory*, § 1448. — *Jurisdiction of circuit court*, § 1449. — *Bank as nominal party*, § 1450. — *Interpleader*, § 1451. — *Amount*, § 1452.

§ 1438. A national bank cannot sue in a federal court out of its district except on the ground of citizenship. *St. Louis Bank v. Allen*, §§ 1466-68.

§ 1439. A national bank is a citizen of its state in the same sense in which other corporations are citizens. *Ibid.*

§ 1440. The right of national banks to sue in any federal court on the ground of citizenship is not excluded by the grant of the right to sue in the circuit court of their own district without regard to citizenship. *Ibid.*

§ 1441. A national bank, established under the act of June 3, 1864, may sue or be sued in the circuit court for its own state, irrespective of citizenship. *Commercial Bank v. Simmons*, §§ 1456-57.

§ 1442. In such a suit as the above, the bank sues, not under the judiciary act, but under its charter, the national banking act; and the restriction in the judiciary act as to suits by assignees does not apply. *Ibid.*

§ 1443. A national bank may sue and be sued just as a natural person. *Manufacturers' Bank v. Baack*, §§ 1458-63.

§ 1444. The only right of a national bank to sue out of its own district is that given to all citizens by section 11 of the judiciary act. *Ibid.*

§ 1445. A national bank is located at the place specified in its organization certificate, and its corporators are conclusively presumed to be citizens of that state, as in case of other corporations. *Ibid.*

§ 1446. Congress has passed no laws with the intention of prohibiting national banks from suing as plaintiffs in the federal courts. *Ibid.*

§ 1447. Banks organized under the national banking act are residents of the district where they are located, and as such may sue and be sued as natural persons. *Main v. Second National Bank of Chicago*, §§ 1464-65.

§ 1448. National banks are not migratory and cannot be found out of the state of their location. *Ibid.*

§ 1449. A circuit court has jurisdiction of all suits by or against a national bank within its district. *Foss v. First National Bank*, §§ 1466-68.

§ 1450. *Quære*: Whether this rule would apply where the bank was a nominal party only? *Ibid.*

§ 1451. A circuit court has jurisdiction of a bill of interpleader brought by a national bank of its district against claimants also of its district. *Ibid.*

§ 1452. A national bank has not the right to sue in federal courts out of its district if the amount in controversy be less than \$500. *St. Louis Bank v. Brinkham*, § 1469.

[NOTES.— See §§ 1470-1485.]

ST. LOUIS NATIONAL BANK *v.* ALLEN.

(Circuit Court for Iowa: 2 McCrary, 92-96. 1881.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—The demurrer to the declaration in this case raises the question whether a national bank, organized under the act of congress of June 3, 1864 (13 Stat., 12), and located in St. Louis, Mo., is authorized to sue in this court a citizen of this state. In the discussion of the demurrer two questions have been suggested: 1. Whether a national bank is authorized to sue in any circuit court of the United States independently of any question of citizenship? and 2. Whether for the purposes of jurisdiction a national bank is to be regarded as a citizen of the state in which it is established and located?

§ 1453. *A national bank cannot sue in a federal court out of its district except upon the ground of its citizenship.*

1. Although upon the first question there may be room for doubt, we are inclined to answer it in the negative. The language of the statute is, that national banks shall have power "to sue and be sued, complain and defend in any court of law or equity as fully as natural persons." A fair construction of this provision would seem to go no further than to place these corporations on an equal footing with natural persons, and to confer upon them the right to sue and be sued in the federal courts only to the same extent as natural persons, and under like circumstances and conditions. The first charter of the United States Bank, enacted in 1791 (1 Stat., 191), contained a provision which empowered the bank "to sue and be sued, etc., in any court of record or any other place whatsoever." This language is more comprehensive than the corresponding clause above quoted from the present banking act, for it does not contain the words "as fully as natural persons," and yet it was construed by the supreme court as not broad enough to authorize suit by a bank in a circuit court of the United States. *Bank of United States v. Deveaux*, 5 Cr., 85 (§§ 1344, 1345, *supra*). In that case the court held that the general words employed in the act gave only a general capacity to sue, and not a particular privilege to sue in the courts of the United States. It was probably in view of this decision that congress, in the second bank charter, enacted in 1816 (3 Stat.,

101), provided expressly that the bank should have power to sue and be sued "in all courts having competent jurisdiction, and in any circuit court of the United States." Upon the first question, therefore, our conclusion is that, as the right of a national bank to sue in this court is assimilated to the right of a natural person under the statutes to do so, it is a right which can be maintained only upon the ground of citizenship, since that is the test which must be applied to natural persons.

§ 1454. *For purposes of jurisdiction a national bank is a citizen of the state in which it is located, similarly to corporations created by the state.*

2. Can the plaintiff, a national bank, sue as a citizen of Missouri? By a long course of adjudications by the supreme court of the United States, it has been settled that a state corporation is, for jurisdictional purposes, to be regarded as a citizen of the state by whose laws it is created. These adjudications are, however, for the most part, not placed upon the ground that a corporation can in any proper sense be a citizen within the meaning of that term as employed by the constitution. On the contrary, it is repeatedly declared that a corporation cannot possess the attributes of citizenship, and the rule is upheld upon the ground that a suit brought by or against a corporation is regarded as a suit brought by or against the stockholders of the corporation; and for the purpose of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation. *Insurance Co. v. French*, 18 How., 404 (CORP., §§ 1140-45); *Muller v. Dows*, 94 U. S., 444 (CORP., §§ 1574-79); *Covington Drawbridge Co. v. Shepherd*, 20 How., 233 (§§ 1088-89, *supra*).

The question for our consideration in this case is, does this rule apply to a national bank, created by act of congress, but located and established within a particular state? It is clear that a corporation acquires no attribute of citizenship by being organized under or created by a state law, that it would not possess if created by a law of the United States. The difficulties in the way of permitting corporations to sue in the federal courts on the ground of citizenship apply with the same force whether a corporation derives its existence from a state or a national law. These difficulties have been overcome, with respect to state corporations, by adopting an arbitrary presumption as to the citizenship of the stockholders—a presumption no doubt often contrary to the fact, but justified in the opinion of the supreme court by considerations of great public importance. These considerations apply alike to all corporations located and doing business within a state, whether chartered under state or federal authority. The policy of the adjudications referred to is to treat corporations as citizens of the state in which they are located; the circumstance that they derive their existence from a state law makes no difference. If they are created by an act of congress and located within a state, they become within the reason of the rule citizens of the state as much as state corporations. In delivering the opinion of the supreme court in *Letson's case* (the leading case upon this subject), Mr. Justice Wayne said: "When a corporation exercises its powers in the state which chartered it, that is its residence." 2 How., 497. An examination of the national bank act will clearly show that national banks are, in most respects, purely local institutions. They are distributed among the states and territories with due regard to their several wants, and by a fixed rule of apportionment. It is provided by the sixth section of the act of 1864, that the organization certificate of every national bank "shall specify the place where the operations of discount and deposit of the association are to be

carried on, designating the state, territory or district, and also the particular county and city, town or village." Numerous other provisions of the act refer to the associations to be organized under it as "located" within the states. They are also made subject to taxation under state law. It is far from correct to say that because they are organized under a law of the United States they possess the same and equal rights in all the states. They must carry on their business of banking at the place named in their organization certificate, and nowhere else. For all practical purposes they exercise their functions only within the limits of the state in which they are located, and should one of them attempt to carry on business outside of those limits, it would find itself completely without authority. For these reasons we conclude that a national bank, being a corporation created by competent authority, and located within a state, with power to transact business there, and not elsewhere, should be regarded, for all the purposes of the jurisdiction of the federal courts, as on an equal footing with state corporations. This view is much strengthened by the provision of the bank act already quoted, which gives these corporations power to sue and be sued "in any court of law or equity as fully as natural persons." If this provision is construed as excluding all cases by or against a national bank which could not be brought by or against a natural person, it must also, we think, be construed as including all cases in which the court would have jurisdiction if the bank were a natural person. In other words, congress, by enacting this provision, must be supposed to have assumed that these corporations would be regarded, for jurisdictional purposes, as citizens of the states where located; for otherwise it would have been impossible to confer upon them the right to sue in all courts "as fully as natural persons." It must have been understood by congress that they were, for jurisdictional purposes, to stand in the attitude and possess the attributes of natural persons.

§ 1455. *The granting of the right to national banks to sue in the circuit court of their district, irrespective of citizenship, does not exclude their right to sue out of the district on the ground of citizenship.*

It is insisted that jurisdiction in this case is by necessary implication excluded by the terms of section 629 of the Revised Statutes, which, among other things, provides that the circuit courts shall have original jurisdiction "of all suits by or against any banking association established in the district in which the court is held, under any law providing for national banking associations." But it is very clear that the effect of this provision is not to oust the court of jurisdiction under other provisions of the statutes of the United States. It gives to the circuit court jurisdiction in cases by or against national banks "established in the district in which the court is held," independently of any question of citizenship, and without reference to the subject-matter; but it does not prohibit the exercise of jurisdiction in any case which, under the bank act itself or under the judiciary act or any of its amendments, might have been brought independently of that provision. There is nothing in the language in question to exclude jurisdiction in any other class of cases; it is permissive merely, and there is no necessary conflict between it and the provisions of law under which jurisdiction is claimed in the present case. Our attention has also been called to the provisions of section 640 of the Revised Statutes, by which national banks are excluded from the right conferred upon other federal corporations, to remove suits brought against them in the state courts; but we are unable to see that this provision has any application to the question of the original jurisdiction of the circuit courts. The conclusions we have reached are supported

by the following authorities, and we know of none to the contrary. *Manufacturers' National Bank v. Baack*, 8 Blatch., 137 (§§ 1458-63, *infra*); *Cook v. State National Bank*, 52 N. Y., 96; *Davis v. Cook*, 9 Nev., 134; *Dillon on Removal of Causes*, 51. The demurrer to the petition is overruled.

LOVE, D. J., concurs.

COMMERCIAL NATIONAL BANK OF CLEVELAND *v.* SIMMONS.

(Circuit Court for Ohio: 1 Flippin, 449-456. 1876.)

Opinion by WELKER, J.

STATEMENT OF FACTS.—This suit is brought on two promissory notes payable to the order of J. G. Simmons & Co., and indorsed to the plaintiff. The petition states that the plaintiff is a corporation existing under the laws of the United States, and does not state that the payee of the notes is not a citizen of Ohio.

The defendants, Thompson and Mills, demur to the petition, and assign three grounds of demurrer: 1st. That it appears on the face of the petition, in each of said causes of action, that the court has no jurisdiction of the defendants, or either of them, or of the subject of the action. 2d. That the plaintiff and its assignor are both residents of the state of Ohio, and of said district, and have no legal right to bring suit against the defendants in this court. 3d. For other good and sufficient reasons appearing on the face of the petition.

This demurrer raises two questions: 1st. Whether the plaintiff can sue in this court, being located in the state of Ohio, and in this district? 2d. Whether, under the judiciary act of 1789, and the limitation of the eleventh section thereof, the plaintiff can sue in this court upon the promissory notes in petition described, the assignor thereof to the plaintiff being a citizen of the state of Ohio, and of this district.

§ 1456. *A national bank may sue in the circuit court for its own state without regard to citizenship.*

In order to dispose of the questions made, it will be necessary to examine the provision of the act of congress "to provide a national currency," etc., approved June 3, 1864, under which the plaintiff was organized, and also the act on the same subject, approved in 1863. The fifty-ninth section of the act of 25th February, 1863, provides that "all suits, actions and proceedings by or against any association under the act may be had in any circuit, district or territorial court of the United States held within the district where such association was established." The fifty-seventh section of the act of 1864 provides: "That suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States held within the district in which such associations may be established, or in any state or municipal court in the county or city in which such association is located having jurisdiction in similar cases."

It is claimed by the defendants that, under this section as amended, suit cannot be brought by national banks in the state in which they are established; that it only applies to suits against such associations. That, it is true, would seem to be the provision of the section. But the supreme court of the United States, in the case of *Kennedy v. Gibson*, 8 Wall., 498 (*BANKS, NAT.*, §§ 6-12), have given a construction of these two sections that is binding upon this court. Justice Swayne, delivering the opinion of the court, says:

“The fifty-ninth section of the act of February 25, 1863, provides that all suits by or against such associations may be brought in the proper courts of the United States or of the state. The fifty-seventh section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the fifty-ninth section of the preceding act. In the latter the word by, in respect to such suits, is dropped. The omission was doubtless accidental. It is not to be supposed that congress intended to exclude the associations from suing in the courts where they can be sued. The difference in language in the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1863. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits against the associations, there is none for suits by them in any court.” Again, in 10 Wall., 605 (BANKS, §§ 101–118), the National Bank of Boston sued a state bank of the same state in the circuit court of Massachusetts, and the action was maintained. This case recognizes the construction given to these sections by Justice Swayne by entertaining jurisdiction in that case.

We may then regard the section as reading by or against, and authorizing suit by or against these associations. It is claimed, also, by defendants that the fifty-seventh section only provides for suits under or authorized by the act, that is, for liabilities under the act. This is not tenable. The words “under this act” refer to and apply to associations under the act as descriptive of the parties authorized to sue or be sued, and not to liabilities or causes of action.

§ 1457. *A national bank sues, not under the judiciary act, but under its own charter, the act of June 3, 1864, and the restriction as to suits by an assignee in the judiciary act does not apply.*

We now come to the second question made, and a very important one, and about which there well may be difference of opinion. I have examined it with much care, in order to arrive at a correct conclusion, and feel well satisfied at the conclusions to which I have arrived.

Suppose the plaintiff has the right to sue generally in this court, as we have determined, has it the right to sue on promissory notes assigned to it by a resident of the district? I can find no adjudicated case under the banking law settling this question. The eleventh section of the judiciary act of 1789, after stating that circuit courts shall have jurisdiction in civil cases, etc., in all cases where the suit is between a citizen of the state where “the suit is brought and a citizen of another state,” provides: “Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.”

I find two cases in 9 Wheaton, decided by the supreme court under a similar question made, which arose under the charter of the old United States Bank. In the first case, 9 Wheat., 740, *Osborn v. The United States Bank* (CONST., §§ 2363–87), it is decided that the charter of the bank confers on the bank the right to sue in any circuit court of the United States. In delivering the opinion in this case, Chief Justice Marshall says: “The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is the law of the United States. This

being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States.”

Another case was decided at the same term of the supreme court: 9 Wheat., 905, *The United States Bank v. The Planters' Bank of Georgia* (§§ 692, 693, *supra*). The suit was originally brought by the United States Bank against defendant in the circuit court for the district of Georgia, upon notes payable to a citizen of Georgia, and indorsed and transferred to the bank. The defense set up was that the court had no jurisdiction under the eleventh section of the judiciary act, or rather the limitation to it. In delivering the opinion of the court Chief Justice Marshall says:

“We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the state of Georgia. The words of the judiciary act, section 11, are:” (He then quotes the part of the act above quoted, being the limitation, and says:) “This is a limitation on the jurisdiction conferred by the judiciary act. It was apprehended that bonds and notes given in the usual course of business by citizens of the same state to each other might be assigned to citizens of another state, and thus render the maker liable to a suit in the federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits brought by the citizen of one state against the citizen of another restrains that jurisdiction where the suit is brought by an assignee to cases where the suit might have been sustained had no assignment been made. But the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States. . . . There is, consequently, scarcely a debt due to the bank for which a suit could be maintained in the federal court did the jurisdiction of the court depend on citizenship. A general power to sue in any circuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one. We think, then, that the charter gives to the bank a right to sue in the circuit courts of the United States without regard to citizenship.”

Now let us examine the banking law itself under which the plaintiff was organized. Section 8 of the act of 1864 provides: “That every association formed pursuant to the provisions of this act shall, from the date of the execution of its organization certificate, be a body corporate. . . . By such name it may make contracts, sue and be sued, complain and defend in any court of law and equity as fully as natural persons, . . . and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security,” etc. Then follows in the same act, section 57, already quoted, providing “that suits, actions and proceedings, by or against any association under this act, may be had in any circuit, district or territorial court of the United States within the district in which such association may be established.”

To ascertain the privileges and powers conferred upon the banking associations, these sections are to be taken and construed together. It seems to me that these privileges and powers thus given in this act are as broad and com-

prehensive as those given to the United States Bank by its charter, and referred to in the case of 9 Wheaton. It must be borne in mind that in the judiciary act the right to sue or be sued mainly depends upon citizenship of the parties. That corporations are only allowed to sue or be sued in the federal courts, under the act, through the legal fiction of citizenship, arising from the presumption that such corporations are citizens of the states under whose laws they are created. These banking associations, not being created by state laws, have no state citizenship growing out of the presumed residence of the stockholders.

Under the judiciary act, then, they have no power to sue in federal courts, and must therefore derive it from the act creating them. Having no right to sue under that act, the limitation in the eleventh section as to suits upon indorsed notes and choses in action does not apply; the right to sue under that section, and the limitation thereto, go together, the one controlling the other. If the matter of citizenship, in reference to the national banks, is dispensed with in favor of such banks, then what reason is there for the application of the limitation as to suits on assigned paper? That limitation is only attached to enforce the privileges of citizenship and to prevent its abuse in bringing suits in federal courts. And further, the banks in purchasing notes, etc., only are doing what the law authorizes them to do.

I may then well say, as was said in the case in Wheaton, that the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter. The charter of the old United States Bank was but a law, as this general act is a law of the United States. The judiciary act does not control the right and power of these banks to sue in the federal courts. The demurrer to the petition is overruled.

MANUFACTURERS' NATIONAL BANK OF CHICAGO *v.* BAACK.

(Circuit Court for New York: 8 Blatchford, 137-146. 1871.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The bill in this case describes the plaintiffs as "The Manufacturers' National Bank of Chicago, Illinois, a banking corporation incorporated and existing under and by virtue of an act of the congress of the United States, entitled 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864, and having capacity to sue by the above title, and a citizen of the state of Illinois, and located and residing and doing business in the city of Chicago, in said state." It describes the defendants as citizens of the state of New York. The allegations of the bill as to the incorporation and location of the plaintiffs are admitted by stipulation. The plaintiffs move for an injunction and the appointment of a receiver in the case, and the question arises whether, on the allegations of the bill thus admitted, with the fact that the allegation of the bill as to the citizenship of the defendants is not denied by the answers, this court has jurisdiction of the suit.

§ 1458. *Provisions of the national bank law as to the status in court of a national bank.*

The eighth section of the act of June 3, 1864 (13 U. S. Stat. at Large, 101), under which the plaintiffs are incorporated, provides that every association formed pursuant to the provisions of the act shall be a body corporate, and may have a corporate seal, and shall have succession by the name designated

in its organization certificate, and may by such name "sue and be sued, complain and defend in any court of law and equity, as fully as natural persons." The effect of this provision is not to give to the corporation the right to sue or the capacity to be sued in every court within the United States, whether state or federal, or to give to every such court jurisdiction over every suit which may be brought in it wherein the corporation is plaintiff or defendant. Its only proper effect is to provide that the corporation, when it has come or been brought as a suitor into a court which has jurisdiction of the suit, shall stand in court, in all respects, in the same position as regards its own rights or the rights of others against it, as to the subject-matter of the suit, in which a natural person, who is a suitor in such court, can stand. The question as to the proper court in which the suit is to be brought in respect of jurisdiction is left to be determined by other provisions of law. If a natural person had brought this suit in this court against the defendants as citizens of New York, he would have been obliged to aver himself to be a citizen of some state other than New York, the bill being what is known as a creditor's bill, founded on a judgment at law, and praying for equitable relief. Therefore, so far as the provisions of section 8 of the act are concerned, the plaintiffs must show, by the averments of their bill, jurisdiction of this suit by this court by showing proper citizenship in the parties.

§ 1459. *A national bank can only sue out of its own district by virtue of the eleventh section of the judiciary act of 1789.*

There is no other provision of the act which can be cited as giving to this court jurisdiction of this suit. The fifty-seventh section, even if under the *dictum* of Mr. Justice Swayne, in *Kennedy v. Gibson* (8 Wall., 498, 506; *BANKS, NAT.*, §§ 6-12), it be held to refer to suits by national banks as well as to suits against them, relates only to suits to be brought in courts of the United States held within the district in which the bank is established, and does not affect the question of the jurisdiction of this court in this suit. Such jurisdiction, in order to be sustained, must therefore appear, by the averments of the bill, to be brought within that provision of the eleventh section of the judiciary act of September 24, 1789 (1 U. S. Stat. at Large, 78), which gives to this court original cognizance of all suits of a civil nature in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the suit is between a citizen of the state where the suit is brought and a citizen of another state.

The averment in the bill that the plaintiff corporation is a citizen of the state of Illinois is, in and of itself, not sufficient to show jurisdiction, as a corporation cannot be a citizen of a state in the sense in which that word is used in the constitution of the United States. *The Lafayette Ins. Co. v. French*, 18 How., 404 (*CORP.*, §§ 1140-45); *Covington Drawbridge Co. v. Shepherd*, 20 id., 227, 233, 234 (§§ 1088-89, *supra*). The substance of the averments in the bill in regard to the *status* of the plaintiffs is that they are a banking corporation, incorporated under the act of congress named; that their members are authorized to sue by the title given to the corporation; that the corporation is located and does business at Chicago, in the state of Illinois; and that, therefore, the real plaintiffs, the members of the corporation, must be regarded, on such averments, as citizens of the state of Illinois.

§ 1460. *A corporation created by a state is a citizen of that state, in that its corporators are conclusively presumed to be such citizens.*

The various decisions of the supreme court in cases of suits in the federal courts by and against corporations created by the laws of the states, where the

jurisdiction depended on the citizenship of the parties to the suit, are reviewed in the opinion given by that court in the case of *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286 (§§ 1351-52, *supra*). The law is there stated to be settled, that, where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of such state; that a suit by or against such corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporation; and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. In the case of *Cowles v. Mercer County*, 7 Wall., 118, 121, the rule is thus stated: "A corporation created by the laws of a state, and having its place of business within that state, must, for the purposes of suit, be regarded as a citizen, within the meaning of the constitution giving jurisdiction founded upon citizenship." This rule, however, does not, *ex vi termini*, cover the case of a corporation created by an act of congress.

§ 1461. *Construction of the national banking act with reference to the citizenship of national banks as corporations created by the United States.*

The argument urged against a jurisdiction in this case, drawn from citizenship, is that, as the corporation is created by the United States, the only legal presumption that can be drawn is that its members are citizens of the United States; and that there is no presumption that they are citizens of the state in which the corporation is located. With a view to the consideration of the question raised, it will be necessary to examine the statutory provisions in respect to the location of banking associations. The sixth section of the act of 1864 provides that the organization certificate of every association for carrying on the business of banking, formed under the act (and which, by the execution of such certificate, becomes, under the eighth section, a body corporate), shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the state, territory or district, and also the particular county and city, town or village. The forty-fourth section provides that any bank incorporated or organized under a law of a state may, by authority of such act of congress, become a national association, under the provisions of such act, by the name prescribed in an organization certificate, such as is required by such act, to be executed by a majority of its directors, the certificate declaring that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and "to change and convert the said bank or banking institution into a national association under this act;" and that, on a compliance with certain provisions prescribed in that section, the association shall be held and regarded as an association under the act. There is, therefore, no difference, in regard to its *status*, between an association formed under the act and one converted into a national association under the act. In each case, it must be regarded as holding its corporate existence under and by virtue of the act.

What, then, are the consequences of the fixing of place provided for in the sixth section? The eighth section provides that the usual business of the association shall be transacted at an office or banking house "located" at the place specified in its organization certificate. The ninth section provides that at least three-fourths of the directors shall have resided in the state in which the association is "located," one year next preceding their election as directors, and be residents of the same during their continuance in office. The tenth, fifteenth, eighteenth and forty-second sections speak of the association as be-

ing "located" in a city, town or county. The thirtieth section speaks of the laws of the state where the bank is "located." The thirty-fourth section speaks of the place where the association is "established." The forty-first section speaks of taxes imposed "by or under state authority at the place where such bank is located." The word "place," in this forty-first section, is declared, by the act of February 10, 1868 (15 U. S. Stat. at Large, 34), to mean "the state within which the bank is located." This act of 1868 also provides that the legislature of each state may determine and direct the manner and place of taxing all the shares of national banks "located" within said state, and that the shares of any national bank owned by non-residents of any state shall be taxed in the city or town where such bank is "located." The fiftieth section of the act of 1864 provides that an association may apply to the "nearest" circuit or district or territorial court of the United States, in certain cases, to enjoin the comptroller of the currency. The fifty-seventh section provides that suits, actions and proceedings against any association under the act may be had in any circuit, district or territorial court of the United States held within the district in which the association may be "established," or in any state, county or municipal court in the county or city in which the association is "located," having jurisdiction in similar cases, provided that all proceedings to enjoin the comptroller under the act shall be had in a circuit, district or territorial court of the United States held in the district in which the association is "located."

The twenty-first section of the act of 1864, as amended by the act of March 3, 1865 (13 U. S. Stat. at Large, 498), provides that, of the three hundred millions of dollars of circulating notes authorized to be issued, one hundred and fifty millions of dollars shall be apportioned to associations in the states, in the District of Columbia, and in the territories, according to representative population; and that the remainder shall be apportioned by the secretary of the treasury among associations formed in the several states, in the District of Columbia and in the territories, having due regard to the existing banking capital, resources and business of such states, districts and territories. The act of July 12, 1870 (16 U. S. Stat. at Large, 251), provides (section 1) that fifty-four millions of dollars in notes for circulation may be issued to national banking associations, in addition to the three hundred millions of dollars, and shall be furnished to banking associations organized or to be organized in those states and territories having less than their proportion under the apportionment contemplated by the act of 1865, before referred to, and that a new apportionment of such increased circulation shall be made as soon as practicable, based upon the census of 1870. The sixth section of the act of 1870 provides for "a more equitable distribution" of the national banking currency, by withdrawing circulating notes from banking associations organized in states having a circulation exceeding that provided for by the act of 1865, and issuing a like amount of notes to banking associations organized in states and territories having less than their proportion, the intention being, as declared by the section, that "the circulation so withdrawn shall be distributed among the states and territories having less than their proportion, so as to equalize the same." The seventh section of the act of 1870 provides that, after the 12th of January, 1871, any banking association "located" in any state having more than its proportion of circulation may be removed to any state having less than its proportion of circulation, under such rules and regulations as the comptroller of the currency, with the approval of the secretary of the treasury, may require.

§ 1462. *A national bank is "located" at the place specified in its organization certificate, and its corporators are conclusively presumed to be citizens of the state, as in case of other corporations.*

It is quite apparent, from all these statutory provisions, that congress regards a national banking association as being "located" at the place specified in its organization certificate. If such place is a place in a state, the association is located in the state. It is, indeed, located at but one place in the state, but, when it is so located, it is regarded as located in the state. The requirement that at least three-fourths of the directors of the association shall be residents, during their continuance in office, in the state in which the association is located, especially indicates an intention on the part of congress to regard the association as belonging to such state. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which representatives any person dealing with the corporation must deal, are required to reside in the state where the corporation is "located." The reasons so forcibly stated in the opinion of the court in the case of *Marshall v. Baltimore & Ohio R. Co.*, 16 How., 314, 326-329 (CONTRACTS, §§ 555-62), why a grant of power by competent authority to certain associated persons to act by representatives, and to sue and be sued in a collective or corporate name, should not be allowed to prejudice any right of those dealing with such persons, apply as fully to the case of a bank created by federal authority, and located in a particular state, as to one created by state authority and located in the state which created it. The view taken by the court in that case was, that the persons using the corporate name of a corporation created by a state may be justly presumed to be resident in the state which is the necessary *habitat* of the corporation; that the presumption arising from the *habitat* of a corporation created by a state in the place of its creation is conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it; that the right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers, and the combined wealth wielded by corporations in almost every state; and that it is of importance, also, to corporations themselves, that they should enjoy the same privileges in other states, where local prejudices or jealousy might injuriously affect them. The principle has been settled ever since the case of *Louisville R. Co. v. Letson*, 2 How., 497 (§§ 1346-50, *supra*), that, where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of such state. Where a corporation is created by competent authority — authority as competent, within a given state, to create such corporation and to locate it in such state, as is the state itself — and a location and *habitat* within such state, and not elsewhere, is given by the creating authority, to such corporation, there is no reason why the legal presumption should not be that the members of such corporation are citizens of such state, within the meaning of the second section of the third article of the constitution, and of the eleventh section of the judiciary act of 1789. The presumption, in the case of a corporation created by a state, is only arrived at by presuming the members of the corporation to be citizens of the United States, and to be residents in the state, and, therefore, under the decision in *Gassies v. Ballou*, 6 Pet., 761 (§ 1090, *supra*), citizens of the state. The members of a corporation created by the United States, and located in a particular state, in the manner and to the extent in which national banking associations are located in partic-

ular states, may as properly be presumed to be citizens of the United States and residents in the state where the corporation is located, so as thereby to be citizens of such state, as the members of a corporation created by a state may be presumed to be citizens of the United States, and residents in the state creating it, and in which it is located, and, therefore, citizens of such state.

§ 1463. *Construction of congressional legislation on the rights of national banks to sue in federal courts. Cases cited.*

But it is urged that the legislation of congress shows an intention not to confer upon national banking associations the right to sue in the federal courts. The first national banking law was passed February 25, 1863 (12 U. S. Stat. at Large, 665), and was repealed by the sixty-second section of the act of June 3, 1864. The fifty-ninth section of the act of 1863 provided that "suits, actions and proceedings by and against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established." The corresponding section, the fifty-seventh, of the act of 1864 provides that "suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." It is urged that this legislation indicates an intention that national banking associations shall not come into the federal courts as plaintiffs, although they may be brought into those courts as defendants. But, independently of the view taken of the fifty-seventh section of the act of 1864, in the opinion given by Mr. Justice Swayne in the case of *Kennedy v. Gibson* (before cited), it may well be said that the object of that section is to enable a suit to be brought against a bank in any federal court held in the district where the bank is established, without reference to the citizenship of the plaintiff in the suit. Under the decision in the case of *Osborn v. The Bank of the United States*, 9 Wheat., 738 (Const., §§ 2363-87), such a suit is a case arising under a law of the United States, within the meaning of the constitution, the bank being incorporated by a law of the United States, and it is competent for congress to confer jurisdiction over it on the federal courts. But the jurisdiction is expressly confined, by the fifty-seventh section, to suits brought in a federal court held in the district where the bank is established. Under it, however, these plaintiffs, a national bank, could bring a suit in this court against a national bank established in this district. The section embraces any plaintiff who has capacity to sue at all in any court. If these plaintiffs can sue another national bank in this court, it is difficult to see why they should not be allowed to sue in this court defendants who are citizens of New York. I can perceive no evidence, in the legislation referred to, that congress intended that this court should not assume the jurisdiction invoked in this suit.

So, too, the provision in the second section of the act of July 27, 1868 (15 U. S. Stat. at Large, 227), withholding from banking corporations organized under a law of the United States the privilege conferred by that act on other corporations organized under a law of the United States, of removing into a federal court certain suits brought against it, cannot be regarded as affecting the question of original jurisdiction involved in this case. I am, therefore, satisfied that the averments of the bill are sufficient to show jurisdiction, and that this court has jurisdiction of this suit. On the merits, the plaintiffs are entitled to the receiverships and the injunction asked for in their notice of

motion, so far as concerns the property specified in the first and second clauses of such notice; but, inasmuch as such property exceeds the amount of the plaintiffs' claim, the receiverships and injunction will be discharged on the furnishing to the plaintiffs of satisfactory security for the payment of their claim, if they shall recover in the suit. An order will be settled, on notice, embodying proper provisions.

MAIN *v.* SECOND NATIONAL BANK OF CHICAGO.

(Circuit Court for Wisconsin: 6 Bissell, 26-29. 1874.)

STATEMENT OF FACTS.—Proceeding brought against the Second National Bank of Chicago. Service had upon the cashier when he was passing through the district. Defendant now moves to dismiss on the ground of want of jurisdiction.

§ 1464. *Banks organized under the general banking act of congress are residents of the districts where they are located, and as such may sue and be sued as natural persons.*

Opinion by HOPKINS, J.

In the argument filed in support of the motion, it is claimed that a national bank cannot be sued in any court out of the judicial district where it is "located" or "established." I do not think the general banking law admits of such an interpretation. The eighth section of the act of June 3, 1864 (13 Stats. at Large, 101), provides that such corporations may sue and be sued in any court of law and equity as fully as natural persons. I do not think the provision in the fifty-seventh section of the act restrictive of this general authority, but that it was intended rather to enlarge the operation of the eleventh section of the judiciary act of 1789 (1 Stat. at Large, 73, 78), and to confer upon such organizations the right to sue and be sued in the federal courts in the district where located, by a citizen of the same district; and I fully concur with Judge Blatchford's views expressed in his opinion in *The Manufacturers' National Bank of Chicago v. Baack*, 8 Blatch., 137 (§§ 1458-63, *supra*), that the banks organized under the general banking act of congress are to be deemed residents or inhabitants of the state and district where they are "located" and "established." The provisions of the act referred to by him are sufficient to warrant that conclusion, and if this were the only point I should have no hesitancy in overruling the motion.

§ 1465. *A national bank cannot be "found" out of the state of its location.*

But there is a question arising under the provision of the eleventh section of the judiciary act of 1789, which, as interpreted by numerous decisions of the federal courts, seems to me to constitute an insuperable objection to the plaintiff's right to prosecute this defendant in this court. That section provides that "no civil suit shall be brought before either of the courts (circuit or district) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." That the defendant was not an "inhabitant" of this district when this suit was commenced is too plain for discussion. The remaining question is, was the defendant found here at that time?

The defendant, as before stated, was "located" at Chicago; that was its habitation, which does not move around with the person of its officers. The corporation is not migratory. It could not, of its own will and without authority of the law, change its location to this state. Therefore, I must hold that this

court has no jurisdiction over this defendant; that it was not “found” here, within the meaning of the statute. In the case of *The Bank of Augusta v. Earle*, 13 Pet., 519 (Corp., §§ 1123–35), the court say, in speaking of locality of corporation: “It must dwell in the place of its creation, and cannot migrate to another sovereignty.” This, it is true, was said of a state bank, but the same may with equal propriety be said of a national bank. They have a local habitation, an office and place of business within a state or district, as well as a state bank. Justice Nelson in *Day v. Newark India-Rubber Manuf. Co.*, 1 Blatch., 628 (§§ 1622–25, *infra*); and in *Pomeroy v. New York & New Haven R. Co.*, 4 Blatch., 120, examined this question very fully, and arrived at the conclusion in both cases, notwithstanding there was a statute of the state of New York authorizing service to be made upon officers of such foreign company within the state, which would give the state courts jurisdiction of the corporations, that the corporations were not “inhabitants” of the state, and were not “found” there because their officers and agents resided or came into that district; that the officers were not the corporations, and the corporations were not therefore found within the district.

This is a jurisdictional question, and “state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either persons or property which it could not reach within the meaning of the law creating it.” *Toland v. Sprague*, 12 Pet., 328. I do not think the practice act of June 1, 1872 (17 Stat. at Large, 197; R. S. 1874, 173), changes the rule. That relates to the practice and proceedings in suits against parties who may be prosecuted in the federal courts, but does not profess to enlarge their jurisdiction or to extend it over persons or cases not before within the cognizance of the court. As said in *Toland v. Sprague*, 12 Pet., 330, “the acts of congress adopting the state process adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts.”

I think the same construction should be given to the act of 1872 above mentioned, and so construed it does not relieve the case of the question of the *habitat* of this defendant being without the district, and, therefore, not subject to the process of this court. The motion is therefore granted, and this suit dismissed.

FOSS v. FIRST NATIONAL BANK OF DENVER.

(Circuit Court for Colorado: 1 McCrary, 474–480. 1880.)

Opinion by MCCRARY, J.

STATEMENT OF FACTS.—This controversy relates to a fund which, under a written agreement between Simeon H. Foss, Absalom V. Hunter and Charles R. Bissell, was deposited to their joint credit with the First National Bank of Denver. The money can be drawn from the bank only upon the joint check of said Foss, Hunter and Bissell, and a dispute having arisen between them as to their respective shares thereof, no joint check has been signed.

On the 8th of January, 1879, defendant Bissell gave notice in writing to the bank that he claimed seven-twelfths of the fund, and that until his claim was adjusted he objected to the payment of any part of the fund to the other claimants. On the 6th of March following, the plaintiffs in the original bill, Foss and Hunter, served a written notice on the bank, claiming to own nine-twelfths of said fund, and declaring that said Bissell was entitled to three-

twelfths only, and they demanded of the bank payment of eight-twelfths of the amount on deposit, leaving in the hands of the bank one-twelfth, as in dispute between them and Bissell. It also appears, from an inspection of these notices, that Bissell claims four-twelfths of the fund in his own right, and three-twelfths as agent and attorney for one C. J. Reynolds, and that Foss and Hunter deny all claims on behalf of said Reynolds. The plaintiffs in the original bill, Foss and Hunter, instituted this proceeding in order to settle the controversy as to the proper division of the fund, and pray decree directing the payment to them of their alleged share, to wit, eight-twelfths thereof. Defendant Bissell answers, claiming, in his own right and as representing C. J. Reynolds, to be entitled to seven-twelfths.

The bank answers, among other things, that it has no interest in the fund, and is only holding it as a depository, and does not know to which of the claimants it ought of right to render and pay the same. Of the cross-bill filed by the bank I will speak presently. The defendant Bissell moves to dismiss for want of jurisdiction. The motion is urged upon the ground that all the parties are shown by the bill to be citizens of the state of Colorado, and that there is no jurisdiction under the national bank act, because the First National Bank of Denver appears, by the record, to be only a nominal party, without interest in the litigation.

§ 1466. *A circuit court has jurisdiction of all suits by or against a national bank within its district.*

1. It may be regarded as settled that national banks may sue and be sued in the federal courts by virtue of the provisions of section 629 of the Revised Statutes of the United States, which provides as follows: "Section 629 — *Jurisdiction.* The circuit courts shall have original jurisdiction as follows: . . . 'Tenth — Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.'" *First Nat. B'k of Omaha v. County of Douglas*, 3 Dill., 298; *Bank of Bethel v. Pahquioque Bank*, 14 Wall., 383-395 (BANKS, NAT., §§ 252-256); *Kennedy v. Gibson*, 8 Wall., 498 (BANKS, NAT., §§ 6-12).

Under a similar provision of the charter of the United States Bank of 1816, a question was made as to the power of congress to confer jurisdiction upon a federal court in a case not necessarily involving the construction or the validity of a law of the United States, or of some provision of the constitution, or of a treaty. This question was raised upon the second section of the third article of the constitution, which limits the judicial power of the United States to "cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," and it was claimed that a case against a bank of the United States was not necessarily a case arising under a law of the United States. But the supreme court, in the case of *Osborn v. United States Bank*, 9 Wheat., 738 (CONST., §§ 2363-87), in which an elaborate opinion was delivered by Chief Justice Marshall, held that the act of congress conferring jurisdiction upon the circuit courts in all suits by or against such banks, irrespective of the subject-matter, was constitutional. This ruling applies with full force to the construction of the above-quoted provision of the Revised Statutes.

§ 1467. *Quære: Whether the above rule applies when the bank is a nominal party only.*

2. It seems to be well settled that the joining in a suit of merely nominal or formal parties can have no effect either in conferring or excluding jurisdiction.

Browne v. Strode, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat., 421; *Wood v. Davis*, 18 How., 467. Trustees and executors do not belong to this class. They are, although suing for others, the real prosecutors of the suit. They are parties to the contract. *McNutt v. Bland*, 2 How., 9, 10 (§§ 878–880, *supra*); *Knapp v. Railroad Co.*, 20 Wall., 117. In the latter case, which was a suit by a trustee, the court said: “He is not a mere passive instrument in the litigation. On the contrary, he is active in prosecuting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. As the cause of action is vested in him, the court looks to his citizenship in determining the question of jurisdiction, and not to the residence of those persons who are beneficially interested in the subject-matter of the litigation.” *McNutt v. Bland* was a suit on the official bond of a sheriff, executed to the governor of the state. The action was brought in the name of the governor of Mississippi, against a citizen of that state, but for the use of citizens of another state. The jurisdiction was upheld upon the ground that the governor was a nominal party only, the court observing that “in no just view of the constitution or law can he be considered a litigant party; both look to things, not names; to the actors in controversies and suits, and not to the mere forms or inactive instruments used in conducting them, in view of some positive law.”

Upon the authority of these and other similar cases, I conclude that where jurisdiction is dependent upon the parties to the suit, we are to look to the real and not to the merely nominal or formal parties. Where suit is brought against a national bank by virtue of the statute under consideration, it must appear that the bank is a real, active party to the litigation in order to maintain the jurisdiction. If the case stood upon the original bill and answer, I should entertain grave doubts as to jurisdiction. It could, in that case, be upheld, if at all, upon the ground that the proceeding, if conducted to a termination, would result in a judgment against the bank.

§ 1468. *Where a national bank, custodian of a trust fund, by cross-bill requires claimants to interplead, the circuit court has jurisdiction of the controversy.*

3. But the bank itself has chosen, by its cross-bill, to invoke the aid and protection of this court as a court of equity, and I will now consider whether it has, in this way, brought the controversy within the jurisdiction.

The circuit courts have jurisdiction of suits instituted by national banks in equity as well as at law; and the question to be determined is whether the cross-bill in this case may be regarded as in itself constituting a suit within the meaning of the equity rules and practice prevailing in this court. The cross-bill is filed by the bank against all the claimants of the fund in question, and it sets out the facts already referred to in this opinion. It also avers that plaintiff in the cross-bill is a national bank, organized and existing under the national banking act approved June 3, 1864, and amendatory acts, doing business at Denver, Colorado, within this district. It sets forth the fact of the filing of the original bill in this case, and the substance of the allegations therein, as well as a statement of the conflicting claims and demands upon said fund, of Foss and Hunter on one side and Bissell on the other. Concerning the fund in dispute, the cross-bill sets forth that “the same is now in the bank of your orator, which sum your orator is informed and believes is in dispute between the said Bissell on the one side, and the said Foss and Hunter upon the other; that each party demands the right to own said sum of money last above stated; that your orator claims no right, title or interest in or to the same, but is merely holding it as a depository or stakeholder, and does not know to which of the

claimants he ought of right to render and pay the same. And your orator further represents and shows to the court that it is under no liability to either said Foss and Hunter or said Bissell beyond that which arises to the title to the money so deposited in its bank. Said Bissell on the one hand, and Foss and Hunter on the other, demand that your orator should pay such money over to them, but they refuse to join in a joint check or order in checking the same out; that your orator has doubts as to which of said parties really owns said money, and that it cannot safely pay or render it to one party without being liable for the same debt to the other," etc.

The prayer is that defendants may be required to interplead, and settle or adjust between themselves their right or claim in or to the disputed fund, the bank declaring its readiness to pay in accordance with the decree of the court. It is well settled that a trustee or bailee who is sued, or in danger of being sued, by several claimants of the same property, may have relief by filing a bill to compel them, by the authority of a court of equity, to interplead and settle their dispute in one suit. This rule is based upon the ground that such a proceeding relieves the bailee or depository from being harassed by suits in which he has no interest; and it is especially applicable to a case "where two or more persons severally claim the same thing under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from conflicting claims of the parties." 2 Story's Eq. Jur., § 806. The proceeding may be instituted, not only to secure for the bailee or depository protection against being compelled to pay or deliver the thing claimed to both claimants, but also to relieve him from the vexation attending upon the suits which are or may be instituted against him. For a full discussion of the whole subject see 2 Story's Eq. Jur., §§ 801 to 813*b*, inclusive, and cases cited in notes. The doctrine has been applied to the case of a bank having possession of funds claimed by adversary parties, which is this case. *The City Bank of New York v. Skelton*, 2 Blatch., 14.

4. The remedy in such a case is, as will be seen from an examination of the foregoing authorities, by bill of interpleader, which is an original bill, filed by a person who claims no interest in the subject-matter, in opposition to the person against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the plaintiff in the bill. Story's Eq. Pl., § 18. The remedy is here sought by means of a cross-bill, filed in a case already commenced; but upon examining this pleading I find that it is in substance, and in everything but name, an original bill of interpleader, and I am of the opinion that for the purposes of this motion it may be regarded as an original suit brought by the bank, in the nature of a bill of interpleader, against the several claimants of the fund in controversy. It was filed before answering the original bill, and it contains all the substantial allegations of a bill of interpleader, including a prayer for process and for relief. Story's Eq. Pl., ch. 6. In form, the bill, considered as a bill of interpleader, may be slightly defective, but in substance it is sufficient, and in considering the question of jurisdiction we will look to the substance rather than to form. As the whole controversy is presented by the cross-bill, and can be settled thereunder, I have no hesitation in holding that this court has jurisdiction, and the motion to dismiss is accordingly overruled.

ST. LOUIS NATIONAL BANK *v.* BRINKHAM.

(Circuit Court for Kansas: 1 McCrary, 9-11. 1880.)

Opinion by FOSTER, D. J.

STATEMENT OF FACTS.—The plaintiff is a national bank, duly organized under the act of congress of June 3, 1864 (13 U. S. St., 99), and is established and doing business at the city of St. Louis, state of Missouri. It brings this action against the defendant, who is a citizen of the state of Kansas, to recover the sum of \$138.51, with interest from August 10, 1880, at ten per cent. per annum, for so much money collected by defendant for the use and benefit of plaintiff. The defendant maintains that the plaintiff being a national bank established out of this judicial district, this court has no jurisdiction. The question is one upon which I have found no adjudicated case, and we have to look to the several acts of congress to determine the point at issue.

§ 1469. *A national bank has no right to sue in federal courts out of its district, if the amount in controversy is less than five hundred dollars.*

Involving, as it does, the right of national banks to sue in the federal courts out of the district in which they are established, the question presented is an interesting one. The amount in controversy in this case being less than \$500, that alone would defeat the jurisdiction, unless there is some law authorizing national banks to sue in the federal courts out of the district where they are established, and without regard to the sum in controversy.

Section 59 of the act of 1863, commonly known as the "Currency Act" (12 U. S. St., 681), reads as follows: "That suits, actions and proceedings, by and against any association under this act, may be had in any circuit, district or territorial court of the United States, *held within the district in which such association may be established.*"

The act of June 3, 1864 (13 U. S. St., 116, § 57), re-enacts this section, omitting the words "by and," so it in terms only authorized proceedings in said courts against such associations and not by them. But the supreme court, in *Kennedy v. Gibson*, 8 Wall., 506 (BANKS, NAT., §§ 6-12), held that the omission of those words was accidental and not intentional, so the law remained in that respect as it was originally enacted. When the revision of the United States statutes was had, this section was dropped from the currency act, title "National Banks," and was placed under the title "Judiciary," and there reads as follows: "The circuit courts shall have original jurisdiction as follows: . . . *Tenth.* Of all suits by or against any banking association, *established in the district for which the court is held*, under any law providing for national banking associations." U. S. Rev. St., 110, 111.

It will be seen that this provision is in substance the same as that contained in the currency acts before mentioned, and very clearly limits the jurisdiction to suits by or against *banking associations established in the district where the court is held*, and that jurisdiction in no way depends upon the amount in controversy. There is but one other provision of the law touching this question, and that is found in the Revised Statutes (2d ed.), 903, under the title "National Banks," and among the enumerated powers conferred on these banks is the following: "To sue and be sued, complain and defend, in *any* court of law and equity, *as fully as natural persons.*" This provision is copied *verbatim* from the currency acts of 1863 and 1864.

There is nothing in this enactment conferring any special jurisdiction on the federal courts in cases where national banks are parties; but these banks are

placed on an equal footing with natural persons in all courts of law and equity. Now in the case of natural persons the citizenship of the parties and the amount in controversy in actions of this nature are both material, and are the controlling elements to jurisdiction in this court.

I need not decide or discuss the question whether a national bank organized under the law of congress and established in the state of Missouri is a citizen of that state under the rule recognizing corporations organized under the laws of a state as citizens of that state, for the purpose of suing and being sued in the federal courts. Even if the affirmative of that proposition could be maintained, there would still be a want of jurisdiction in this case, as the amount in controversy is not sufficient, and on that ground this case must be dismissed, and the costs paid by defendant refunded to him.

§ 1470. **National banks.**—Circuit courts have jurisdiction in all suits by or against national banks within their districts, and it is not necessary that the case involve the construction of some provision of constitution, law or treaty of the United States. *Third National Bank v. Harrison*,* 3 McC., 162.

§ 1471. In a suit by a national bank in the circuit court for its own district, under the banking act of June 3, 1864, the right of the bank to sue is not dependent upon the judiciary act, and the restriction as to suits by assignees does not apply. *Commercial Bank v. Simmons*, 1 Flip., 449 (§§ 1456-57).

§ 1472. Section 629 of the Revised Statutes of the United States gives the circuit courts jurisdiction of suits brought by or against a national bank without regard to the citizenship of the parties, where the suit is brought in the district in which the bank is located. *County of Wilson v. National Bank*, 13 Otto, 776 (BONDS, §§ 1044-48).

§ 1473. The United States statute in amendment to section 5198, specifying certain courts in which national banks may be sued in certain cases, does not exclude suits in other forums. *New Orleans Nat. Bank v. Adams*,* 3 Woods, 21.

§ 1474. By act of congress (13 Stat. at Large, 116), creditors of a national bank may sue it in any state or municipal court which has jurisdiction of the subject-matter of the claim. *Bank of Bethel v. Pahquioque Bank*, 14 Wall., 383 (BANKS, NAT., §§ 252-256).

§ 1475. National banks can only be sued in the courts designated by section 57 of the act of June 3, 1864, the provisions of state statutes to the contrary notwithstanding. *Cadle v. Tracy*,* 11 Blatch., 101.

§ 1476. Suits against national banks are cases arising under a law of the United States, and it was competent for congress to determine the question of jurisdiction. *Ibid.*

§ 1477. *Quære*, whether a national banking association can maintain a suit in the circuit courts of the United States, except in the district where the association is established. *First Nat. Bank of Hannibal v. Smith*,* 6 Fed. R., 215.

§ 1478. Though a national bank incorporated under the provisions of the national banking law may have a complete and adequate remedy in a state court, yet it has also a right to sue in the federal courts and will not be compelled to resort to the state court. *First Nat. Bank of New Orleans v. Bohne*, 8 Fed. R., 116.

§ 1479. The fact that one of the defendants to a cause in a state court is a national bank does not of itself give a right of removal to a federal court. *Pettilon v. Noble*, 7 Biss., 452.

§ 1480. A stockholder in a bank, resident of a state other than that which chartered the bank, may sue the directors of the bank in the circuit court of the United States. *Woolsey v. Dodge*, 6 McL., 144.

§ 1481. If a national bank, plaintiff in a suit in the United States circuit court, alleges that it is a banking corporation incorporated under the banking act of congress, that it has capacity to sue by its corporate name and is a citizen of a certain state, located, residing and doing business in a certain town in that state, then the circuit court of the United States will take jurisdiction of the case, if the defendant, a natural person, is a citizen of another state, for it will conclusively presume that the incorporators of the bank are citizens of the United States, resident in the state in which the bank does business, and therefore citizens of that state. *Manufacturers' Nat. Bank v. Baack*, 2 Abb., 232 (§§ 1458-63).

§ 1482. **Bank of United States.**—The clause in the act of incorporation of the Bank of the United States enabling the bank to sue or be sued in the courts of the United States confers jurisdiction of such cases on the federal courts, and is valid and constitutional. *Osborn v. Bank of United States*, 9 Wheat., 816 (CONST., §§ 2363-87).

§§ 1483-1498. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1483. The right of the Bank of the United States to sue in the federal court is conferred by its charter, and is not affected by the limitation as to the assignment of choses in action in section 11 of the judiciary act. *Bank of United States v. Planters' Bank*, 9 Wheat., 904 (§§ 692, 693).

§ 1484. A suit by the Bank of the United States is a case arising under a law of the United States, *i. e.*, the law incorporating the bank, and hence is within the judicial power granted in the constitution. Jurisdiction in such cases is given the circuit courts by the law of incorporation. *Bank of United States v. Northumberland Bank*,* 4 Wash., 108.

§ 1485. Neither in the judiciary act nor in the charter of the Bank of the United States was jurisdiction given the federal courts in suits by the bank, without averments enabling the court to look behind its corporate character. *Bank of United States v. Martin*,* 5 Pet., 479.

3. Constitution and Laws of the United States.

SUMMARY—*What are cases arising under the constitution*, § 1486.—*Case involving construction*, § 1487.—*Jurisdiction in suits upon a marshal's bond*, §§ 1488-89.—*Jurisdiction given by act of 1875*, §§ 1490, 1492, 1495.—*Sufficient averment*, § 1491.—*Jurisdiction depends upon the cause of action*, § 1493.—*Suit to enforce a right given by congress*, § 1494.—*Suit on a bond given under act of congress*, §§ 1496-97.—*Necessary averment*, § 1498.—*When a case arises under act of congress*, § 1499.

§ 1486. Cases arising under the constitution and laws of the United States, and thus coming within the jurisdiction of the circuit court, are such as grow out of them when any claim or privilege, or any defense, in whole or in part, is asserted under them. *San Mateo County v. Southern Pacific R. Co.*, §§ 1500-1502.

§ 1487. The circuit court has jurisdiction of a case if the defense involves the construction of a clause of the constitution. *Ibid.*

§ 1488. By the act of 1806, authorizing any party damnified to sue for his own use upon a marshal's bond, congress intended to confer upon the federal courts jurisdiction in such cases. *United States v. Davidson*, §§ 1503-1506.

§ 1489. The jurisdiction so conferred is a part of the judicial power of the United States given by the constitution in cases arising under its laws. *Ibid.*

§ 1490. Under the act of March 3, 1875, the entire judicial power of the United States in suits of a civil nature at common law or in equity, and arising under the constitution or laws, is given to the circuit courts. *Eaton v. Calhoun*, §§ 1507, 1508.

§ 1491. It is a sufficient averment for jurisdiction that plaintiff acquired his title through a deed of the United States, executed by an officer under the authority of a certain act, and that his claim of title arises under such act, and that the validity of the act and of the title thereunder are the only questions in controversy. *Ibid.*

§ 1492. The act of March 3, 1875, seems to give the circuit courts original jurisdiction in all cases involving a federal question, and which formerly could have been carried to the supreme court on a writ of error. *Sawyer v. Concordia*, §§ 1509-12.

§ 1493. Jurisdiction depends upon the cause of action rather than upon the ground of defense; and if the former involve a federal question, the circuit court will have jurisdiction, even though the defense concede this question, and make the issues wholly upon other questions of fact. *Ibid.*

§ 1494. A suit to enforce a right given by congress regarding the taxation of property in bank shares is a suit arising under the laws of the United States, and thus within the jurisdiction of the circuit court. *Stanley v. Board of Supervisors*, §§ 1513-14.

§ 1495. The entire judicial power of the United States, in cases arising under the constitution or laws, is intended to be conferred by the act of March 3, 1875. *Ibid.*

§ 1496. A suit on a *supersedeas* bond given under the United States statute requiring the taking of good security when a judge signs a citation on a writ of error, and under the supreme court rule determining the form of security, is a case arising under the laws of the United States within the jurisdiction of the circuit court. *Seymour v. Phillips & Colby Co.*, §§ 1515-18.

§ 1497. From the fact that a bond is given under an act of congress, it does not necessarily follow that the circuit court will have jurisdiction in a suit upon it, if it appear that no question of construction is involved. *Ibid.*

§ 1498. An allegation that a cause arises under the laws of the United States, and necessarily involves the construction of certain acts of congress, will not give jurisdiction to the

circuit court, as it is a mere conclusion of law; it should be supported by a recital of facts, showing how it involves such construction. *Dowell v. Griswold*, §§ 1519-21.

§ 1499. *Semble*, that under the act of March 3, 1875, a case does not arise under an act of congress, unless the right of the party has its origin in such act. *Ibid*.

[NOTES.—See §§ 1522-1529.]

SAN MATEO COUNTY *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

(Circuit Court for California: 7 Sawyer, 517-525. 1882.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is an action to recover of the Southern Pacific Railroad Company, a corporation created under the laws of California, certain state and county taxes levied upon its property for the fiscal year of 1880 and 1881, and alleged to be due to the plaintiff, with an additional five per cent. for their non-payment, and interest. It was commenced in the superior court of the county of San Mateo.

The railroad company, among other things, sets up in its answer as a defense substantially this: That by the thirteenth article of the constitution of the state a mortgage or other obligation by which a debt is secured is treated, for the purposes of assessment and taxation, as an interest in the property affected; that, "except as to railroad and other *quasi* public corporations," the value of the property, less the value of the security, is to be assessed and taxed to the owner, and the value of the security is to be assessed and taxed to its holder (sec. 4); that by the same article the franchise, roadway, road-bed, rails and rolling stock of railroads operated in more than one county are to be assessed by the state board of equalization at their actual value, and apportioned to the counties, cities or towns in which the roads are located in proportion to the number of miles of railway laid therein (sec. 5); that at the time of, and previously to, the assessment of the property of the railroad company upon which the taxes claimed in this action were levied, there existed a mortgage upon the property, executed for advances made for the construction and equipment of the road exceeding \$3,000 for each mile of the same, no part of which has been paid except the accruing interest, and the whole of which was and still is a lien thereon; that the state board of equalization, acting under the authority of the provisions of the state constitution, assessed, as the property of the railroad company, its franchise, roadway, road-bed, rails and rolling stock at what was deemed to be their actual value, without allowing any deduction for the mortgage subsisting thereon, and thus made, as between the property of individuals and that of the railroad company, an unjust and unlawful discrimination against the company; and that the state constitution, in its discriminating provisions, conflicts with the inhibition of the fourteenth amendment of the constitution of the United States, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Upon that inhibition the company relies to defeat the assessment, or at least to reduce it by such deductions as are made in the estimate for taxation of the value of property held by individuals.

The railroad company also sets up, among other things, as a further defense to the action, substantially this: That the section of the thirteenth article of the state constitution, which confers all the authority possessed by the state board to make the assessment complained of, is itself invalid, in this: that whilst it is self-executing, requiring no legislation for its enforcement, it makes no provision for affording to the owners of the property assessed an opportu-

nity to be heard respecting its valuation, but authorizes the board to act without notice to them, without receiving any information from them, and without liability to have its action reviewed, and if erroneous, corrected by any other tribunal, making its judgment, however arbitrary and capricious, final and conclusive. And the company contends that, in thus not affording to it an opportunity to be heard respecting the valuation of its property, whilst an opportunity is afforded to individuals for the correction of errors in the assessed value of their property, a discrimination is made against railroad companies, within the inhibition of the fourteenth amendment.

Claiming, in its answer, protection under the amendment to the federal constitution, against the enforcement of what it alleges to be partial and discriminating provisions of the state constitution, under which the state board acted and by which alone it justifies its action, the railroad company applied by petition to the state court to transfer the action to the circuit court of the United States. The required bond in such cases being filed, the transfer was made. The petition, among other things, alleges that the supreme court of the state has decided that the railroad company is not entitled to the protection of the fourteenth amendment, or to any reductions for its indebtedness secured by mortgage, in the estimate of its taxable property.

The plaintiff now moves that the action be remanded to the state court for trial, as not being removable to the federal court, under the act of congress of March 3, 1875, to determine the jurisdiction of the circuit courts, and to regulate the removal of causes to them from the state courts.

By the federal constitution, the judicial power of the United States extends to all cases in law and equity arising under it, and under the laws of the United States, and treaties made under their authority. The act of 1875 in its first section invests the circuit courts of the United States with original cognizance concurrent with the courts of the several states "of all suits of a civil nature at common law or in equity," thus arising, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500. Its second section declares that any suit of that character thus arising, brought in a state court, may be removed by either party into the circuit court of the United States. The terms used in the act — "*suits of a civil nature*" — are less comprehensive than the term *cases* in the constitution. The latter may embrace proceedings not usually or strictly termed suits, and prosecutions of a criminal nature. There can, therefore, be no serious question as to the validity of the legislation of congress.

§ 1500. *Cases arising under the constitution and laws, and thus within the jurisdiction of the circuit court, are such as grow out of them when any right or privilege, or any defense in whole or in part, is asserted under them.*

The inquiry is as to its meaning; and upon this there might be room for much difference of opinion, if its construction had not already been determined. If we were at liberty to give our view of its meaning, we should not hesitate to limit the authority to remove suits of a civil nature from a state court to a federal court under the act in question to those in which the cause of action arises upon the constitution, laws or treaties of the United States, and not extend it to cases where the defense, as here, rests merely upon some right or privilege claimed under them. Here the cause of action arises upon the constitution and laws of the state prescribing the manner and conditions on which its sovereign right of taxation shall be exercised. There are eminent fitness and propriety in having all such causes disposed of by the local

courts, and in not having them carried into the federal courts with their attendant delays and expense. But the construction we might give, if the question were one of first impression, we are not permitted to give. The supreme court has already passed upon the meaning of the act, and held in express terms against the view suggested. In *Railroad Co. v. Mississippi*, 102 U. S., 135, that court reaffirmed what had been previously declared, that cases arising under the laws of the United States are such as grow out of the legislation of congress, whenever any right, or privilege, or claim, or protection, or defense of the party in whole or in part is asserted under them. Equally, therefore, cases must be held to arise under the constitution, when upon any of its provisions some right, or privilege, or claim, or protection, or defense in whole or in part is asserted in a judicial proceeding. In the *Mississippi* case, which was brought in a state court, the defendant, setting up certain rights claimed under an act of congress, prayed for a removal to a federal court under the act of 1875, and the supreme court held that the party was entitled to it, Mr. Justice Miller dissenting on the ground urged here, that a removal was only authorized when the cause of action was founded on the law of congress, and not where the defense rested upon it; that in this latter case the remedy of the defendant for an adverse ruling was by an appeal after judgment to the supreme court of the United States. The decision of the majority of the court overruling the position of Mr. Justice Miller disposes of the same position taken here.

§ 1501. *The jurisdiction of the circuit court may be maintained when the defense involves a construction of a clause of the constitution.*

The construction given by the court is binding upon us until modified or reversed, as fully as though we had participated in it and adopted its conclusions. Long previously to that decision, Chief Justice Marshall, speaking for the court, had held that a case might be said to arise under the constitution or laws of the United States, whenever its decision depended upon the correct construction of either, or when the title or right set up by a party might be defeated by one construction or sustained by the opposite construction. *Osborn v. Bank of the United States*, 9 Wheat., 822 (Const., §§ 2363-87). If the removal authorized by the act of 1875 is not limited to those cases where the cause of action arises upon the constitution, laws or treaties of the United States, this ruling of the chief justice would also lead to the conclusion reached in the *Mississippi* case. The validity of the assessment of the property of the railroad company, and of the provisions discriminating between the assessment for taxation of the property of such companies and of the property of individuals, may depend upon the construction given to the fourteenth amendment, and the determination whether it applies to artificial bodies as well as to natural persons. The right of the company to a reduction in the estimate of the value of its property assessed for taxation by the amount of the mortgage thereon would be defeated by the construction of that amendment for which the plaintiff insists, and might be sustained by the construction for which it contends. Its case for relief, according to the decisions mentioned, therefore arises under the constitution of the United States.

§ 1502. *Discussion of force and meaning of the fourteenth amendment.*

Whether the fourteenth amendment applies to corporations as well as to natural persons is a question which cannot be determined on this motion. It will come up for determination upon the trial of the action in the consideration of the merits of the company's defense. It is enough to maintain the

jurisdiction of this court according to the decisions mentioned, that the defense necessarily involves a construction of a clause of the federal constitution.

It may not, however, be out of place to make some suggestions as to the force of the fourteenth amendment, in order to draw the attention of counsel to the difficulties in its application in the present case, which they must be prepared to meet on the trial. That amendment was undoubtedly proposed for the purpose of fully protecting the newly made citizens of the African race in the enjoyment of their freedom, and to prevent discriminating state legislation against them. The generality of the language used necessarily extends its provisions to all persons of every race and color. Previously to its adoption, the civil rights act had been passed, which declared that citizens of the United States of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, should have the same right in every state and territory to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, own and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and should be subject to like punishments, pains and penalties, and to none other. The validity of this act was questioned in many quarters, and complaints were made that notwithstanding the abolition of slavery and involuntary servitude, the freedmen were in some portions of the country subjected to disabilities from which others were exempt. There were also complaints of the existence in certain sections in the southern states of a feeling of enmity, growing out of the collisions of the war, towards citizens of the north. Whether these complaints had any just foundation is immaterial. They were believed by many to be well founded; and to prevent any possible legislation hostile to any class from the causes mentioned, and to obviate objections to legislation similar to that embodied in the civil rights act, the fourteenth amendment was adopted. This is manifest from the discussions in congress with reference to it. There was no diversity of opinion as to its object between those who favored and those who opposed its adoption.

The concluding clause of its first section was designed to cover all cases of possible discriminating and partial legislation against any class, in ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person. And this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed be classified, and different kinds be subjected to different rates. Real property may be taxed at one rate and personal property at another. Property in particular places may be taxed for local purposes, whilst property situated elsewhere is exempt. License taxes may also vary in amount according to the calling or business for which they are exacted. But arbitrary distinctions, not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment.

Equality in the imposition of burdens is the constitutional rule, as applied to the property of individuals, where it is subject to taxation at all; and this imports that an uniform mode shall be followed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value, prescribed according to the nature or position of the property. All state action, constitutional or legislative, impinging upon the enforcement of this rule, must give way before it. Congress, in its legislation since the adoption of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 congress re-enacted the civil rights act, and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pains and penalties, it added, and be subject only to like "*taxes, licenses and exactions of every kind, and to no other.*" R. S., sec. 1977.

Looking at the object of the amendment, it must be admitted that it was intended primarily for the protection of the rights of natural persons; its language is mainly applicable to them. If it also include artificial persons, as corporations, whenever its language is susceptible of application to them, it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation. It may be that the chain which binds the individuals into a single artificial body does not keep them in their united form from the protection of the amendment. Corporations are not citizens — the term applies only to natural persons — and yet they are treated as citizens within the clause of the constitution which defines the judicial power of the United States, and declares that it shall extend to controversies between citizens of different states. "That name, indeed" (of the corporation), says Chief Justice Marshall, "cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is in fact and in law between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals. Such has been the universal understanding on the subject." *Bank of the United States v. Deveaux*, 5 Cranch, 61 (§§ 1344-45, *supra*). See also the cases cited in the opinion of the chief justice.

The fifth amendment to the constitution contains a prohibition upon the government of the United States similar to the one in the fourteenth amendment against the action of the states, declaring that no person shall be deprived of life, liberty or property without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals.

As thus seen, the question which will be presented for our determination on the trial of this case is one of the greatest importance. We express no opinion upon it, but invite for it the most thoughtful consideration of counsel. And in their discussions the control of the state over corporations of its creation, where a reserved power of amendment is embodied in their charters or imposed by the constitution, should be considered. The general tendency of modern decisions is to treat corporations with this reserved power as subject at all times to the will of the state as to their rights, powers and liabilities. Such

unlimited control asserted in some cases would, indeed, lift them not only out of the protection of the fourteenth amendment, but also out of nearly all protection, except such as the legislative pleasure of the hour may permit. The motion to remand is denied.

UNITED STATES *v.* DAVIDSON.

(Circuit Court for Illinois: 1 Bissell, 433-437. 1864.)

STATEMENT OF FACTS.—Action on a marshal's bond. Motion to dismiss on the ground that the allegations as to citizenship do not confer jurisdiction.

Opinion by DRUMMOND, J.

This is a suit on the bond of J. W. Davidson, formerly marshal of this district, and his sureties, in the name of the United States, for the benefit of George De Loyne, whose interest alone is affected. It is averred in the declaration that De Loyne is a citizen of the state of Illinois, and also that Davidson and his co-defendants are citizens of the same state. This is a question of great nicety, and I have come to the conclusion that the action can be maintained. I will state very briefly the grounds of my opinion. I assume that the party really in interest here is the person for whose use the suit is brought; that he is to all intents and purposes the plaintiff in the suit. By the terms of the judiciary act of 1789, the marshal, before he enters upon the duties of his office, must give bonds in the sum of \$20,000 for the faithful performance of his duties, with securities satisfactory to the judge. The original act makes no provision as to suit upon the bond. The act of 1806 makes such provision.

§ 1503. *The judicial power of the United States not actually apportioned by the constitution is dormant until brought to life by an act of congress.*

It is necessary to advert to the language of the constitution as to the power existing in courts of the United States to maintain actions. The second section of the third article of the constitution declares "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." The language of the constitution is that judicial power extends, among other cases, to cases arising in law and equity under the laws of the United States. It has been maintained with a good deal of force that this was a self-executing provision; that when the courts of the United States were established by act of congress this provision of the constitution operated directly to vest jurisdiction in courts of the United States. That has not been the construction which has been given to this section of the constitution, but the construction has been that it was necessary that there should be an act of congress to vest in the courts authority to maintain actions in a particular case, and that, unless congress did give jurisdiction, no jurisdiction actually existed; accordingly congress has, from time to time, vested in the courts of the United States jurisdiction in this class of cases, as it is a dormant power that springs into life only by virtue of an act of congress.

§ 1504. *By act of April 10, 1806, a party damnified may sue for his own use upon a marshal's bond; and the United States, if made a party, is so only nominally.*

The law of April 10, 1806 (2 Stat. at Large, 372), provides that "the bond heretofore given, or which may hereafter be given, by the marshal of any district, for the faithful performance of the duties of his office, shall be filed and

recorded in the office of the clerk of the district court, or circuit court, sitting within the district for which such marshal shall have been appointed." The second section provides that "it shall be lawful, in case of the breach of the condition of any such bond, for any person, persons or body politic, thereby injured, to institute a suit upon such bond, in the name and for the sole use of such party, and thereupon to recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for such party in due form; and, in case such party shall fail to recover in the suit, judgment shall be rendered and execution may issue for costs in favor of the defendant or defendants, against the party who shall have instituted the suit, and the United States shall in no case be liable for the same." This court has held in cases which have been formerly considered, that this was, to all intents and purposes, a suit for the sole use and in the name of the party whose interest is affected—in this particular case for the sole use and in the name of George De Loyne; and that it was competent to use, nominally, the name of the United States in instituting the action. It is not compulsory to institute the suit in the name of the person who has been damnified, without the name of the United States—but that the common law right still exists to use the name of the United States for the use of the party.

It is impossible to avoid the conclusion, enforced in the several decisions, that the United States are not substantially the parties upon the record. In the case of *McNutt v. Bland*, 2 How., 9 (§§ 878–880, *supra*), the supreme court of the United States held that McNutt was not, within the meaning of the law of congress, the party upon the record. But that was a suit upon a sheriff's bond given to the governor of Mississippi, and the party really on the record was the party who was damnified, and for whose benefit the suit was brought. The court maintained the jurisdiction. This being so, it would follow that, in this case, the United States are only nominally a party.

§ 1505. *By the act of 1806 jurisdiction is vested in the United States courts in all suits upon marshals' bonds, irrespective of the citizenship of the parties.*

It resolves itself into this: Whether it was the intention of congress, by the second section of the act of 1806, to vest in the courts of the United States jurisdiction where suits were brought on marshals' bonds, on the ground that, within the meaning of the language of the constitution, it is a case under the laws of the United States. It is clear that the laws of the United States determine absolutely as to the responsibility of the marshal and his securities. I have come to the conclusion that it was the intention of this act of congress to vest jurisdiction in the United States courts in all cases of marshals' bonds, irrespective of the citizenship of the parties. It will be observed congress does not use the language it sometimes uses—that suit may be instituted on such bond in any court having jurisdiction of the same, state or national—but the language is, "to institute the suit upon such bond in the name and for the sole use of the party." Is it presumable that congress, in using this language, intended to apply it to the courts of the states? Is it not, on the contrary, a natural presumption that it was to apply to the courts of the United States over which they had supreme control? Was congress speaking of state courts, where it declared that judgment shall be rendered and execution may issue for such party in due form? Was it not intended to apply to courts of the United States? I think it was, and that congress was giving directions to the courts of the United States, and that it was the intention of this act of congress to vest in United States courts jurisdiction in this class of cases.

The third section strengthens this view of the case. It provides that "the said bonds shall, after any judgment or judgments rendered thereon, remain as a security for the benefit of any person, persons or body politic injured by breach of the condition of the same, until the whole penalty shall have been recovered, and the proceedings shall be always in the same manner and as hereinbefore directed." Then comes in the declaration in relation to the limitation of actions.

§ 1506. — *this view strengthened by the argument from inconvenience.*

This is the conclusion I have arrived at on this subject. The argument from inconvenience is very strong in favor of this construction of the act of 1806. If it was the intention of the act of congress that suit could be brought in the state courts only, on these bonds, it is easy to see it would give rise to conflicts of jurisdiction and questions as to the right of priority of claims. It is true that the language might have been more precise and distinct. It might have specified the courts in which suits were to be instituted; but it has not done so, and the only question is, whether it was contemplated by the framers of this law that suits should be instituted in the courts of the United States. I think that is a fair inference from the various provisions of the act. The motion will be overruled.

EATON v. CALHOUN.

(Circuit Court for Tennessee: 2 Flippin, 593-595. 1880.)

§ 1507. *The entire judicial power of the United States in suits of a civil nature at common law and in equity, and arising under the constitution or laws, belongs, under the act of March 3, 1875, to the circuit courts.*

Opinion by BAXTER, J.

The defendant, by demurrer, denies the jurisdiction of this court, on the ground that both the plaintiff and himself are citizens of Tennessee; and this is the only question presented for our determination.

The framers of the constitution seem to have been agreed upon three fundamental ideas: First, that a national judiciary was essential to the maintenance of the national authority; second, that its powers should be co-extensive with those of the legislative department; and third, that it ought to be so organized and endowed as to insure all the purposes of its establishment. And in furtherance of these principles they made the constitution declare "that the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority." But this constitution needed legislation to make it effective. Hence the twenty-fifth section of the judiciary act of 1789 prescribed a mode whereby parties claiming rights under the constitution or laws of the United States could, after unsuccessfully litigating the same through the state courts, have the judgments or decrees of the state courts against them re-examined and reversed or affirmed by the supreme court of the United States.

But this remedy was found to be circuitous, dilatory and expensive. To obviate which, congress passed the act of March 3, 1875, entitled "An act to determine the jurisdiction of the circuit court," etc. This act, in explicit terms, confers original jurisdiction concurrent with the courts of the several states "on the circuit courts of the United States of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of

costs, the sum or value of \$500, and arising under the constitution or laws of the United States." Parties, therefore, claiming rights under the federal constitution or laws may, since the act of 1875, pursue the remedy given by the aforesaid twenty-fifth section, or, in lieu thereof, bring their suit, in the first instance, in the federal tribunals.

§ 1508. *A sufficient allegation for jurisdictional purposes.*

But they must, in either case, show by proper and apt averments, enough to maintain the federal jurisdiction. Does the plaintiff do this in this case? If he does we are bound to retain and try the cause. Upon this point the plaintiff, after alleging title, etc., to the premises sued for, says that he acquired his title "through a deed of the United States executed by the commissioner of internal revenue with the approval of the secretary of the treasury, by virtue of the authority conferred by the act of the 8th of June, 1872, and acts amendatory thereof," and that his "claim of title arises under the aforesaid acts of congress," and that "the validity of said acts of congress, and his title thereunder, are the only questions in controversy" in this case. These averments, admitted by the demurrer, bring the case within the purview of the act of 1875, and clothe the court with jurisdiction in the premises. The demurrer will therefore be disallowed and defendant will be permitted to plead in bar. The district judge concurs.

SAWYER v. PARISH OF CONCORDIA.

(Circuit Court for Louisiana: 12 Federal Reporter, 754-760. 1882.)

Opinion by BOARMAN, D. J.

STATEMENT OF FACTS.—The plaintiff, a lawyer and citizen of Louisiana, sues the parish of Concordia for \$27,000, claimed to be due to him because of certain professional services rendered the defendant, in pursuance of a conditional contract of date December, 1872. He alleges that he completed his part of the agreement before October, A. D. 1879, and that, on the happening of the suspensive condition, his contract became absolute and indefeasible; that, by operation of law, his contract has a retroactive effect, and takes date with the agreement—December, 1872. At that time he alleges the existence of two statutes of the state which gave him remedies for the legal and effectual enforcement of his contract, to wit, the act No. 69, A. D. 1869, and section 2743, R. S. 1870. The act, No. 69, provides substantially as follows: That the judge rendering a judgment against any parish shall order the tax-assessing officers of the defendant parish to assess a special tax, in amount sufficient to pay the judgment creditor; that said tax shall be forthwith collected and held as a special fund for the benefit of such creditor, and shall not be otherwise diverted; provided there are no other funds subject to such judgment in the parish treasury. The act, or section 2743, authorized the parishes in the state to levy and collect such taxes as may be deemed necessary by parish authorities to defray the expenses of the local government.

Having cited these two acts, he alleges that act No. 96, A. D. 1877, repealed them. This act limits the power of the parish so that not more than ten mills can be collected for any purpose, and repeals all general laws authorizing the levy of any *special* or *judgment* taxes. In addition to the repealing statutes, he alleges that article 209 of the state constitution of 1879 limits the parish tax to one per centum on the assessment, and that the sum annually collected in the parish is used and needed for the alimentary purposes of the parochial

government, and will furnish nothing with which to pay his claims; that said parish has no funds on hand, and no property subject to seizure. He alleges that the powers and remedies the courts of the state had and would have exercised, under act No. 69 and section 2743, for the enforcement of the obligation of this contract, have been destroyed and taken away by the enactment of the subsequent acts and article of the state constitution; that these acts, No. 69 and section 2743, *now repealed*, entered into and were vital elements in his contract. That the state has, by these subsequent repealing laws, impaired the obligations of his contract, contrary to article 1, section 10, of the constitution of the United States. He avers that his suit arises under the constitution of the United States. Defendant denies the jurisdiction of this court. His motion is now under consideration.

He urges that "plaintiff and defendant are citizens of the same state, and that plaintiff's demand and alleged contract, if any exists, can be enforced in the courts of the state of Louisiana under act No. 69, A. D. 1869; that said act, and remedy therein provided, was not repealed by act No. 96, 1877, nor by the provisions of the constitution of 1879. After stating so much by way of denying jurisdiction, he adds in his motion that "it is the well settled jurisprudence of the state that these repealing acts and article of the constitution do not affect the remedy or rights of parties under contracts entered into, as plaintiff's was, before the passage of act No. 96, 1877, or before the constitution of 1879." To sustain the suggestions in his motion he cites a number of cases reported in the Louisiana Reports. They will be noticed later. Defendant's objection to this court's jurisdiction, if confined to the suggestions in his motion, is very limited; and, if the question was tried on an admission of all he says, it is doubtful if any circuit court would refuse jurisdiction to try plaintiff's suit since the passage of the act of congress of March 3, A. D. 1875. He denies that act No. 69, so far as it affects the legal rights of the plaintiff, claiming, as he does, under a contract, has been repealed; that the state courts, while allowing the repealing act of 1877 to fatally affect all persons not claiming under an anterior contract, will protect plaintiff from any loss of right or remedy in consequence of the repeal.

§ 1509. *Laws in force at the time of a contract are part of the contract.*

The fact of the repeal cannot be denied. The act No. 69 certainly did exist as an operative law in A. D. 1872, and it is equally clear that act No. 96, of 1877, destroyed the remedies and powers under act No. 69, 1869, and section 2743 of Revised Statutes. The act No. 96, 1877, limits and greatly reduces the per centum of taxation that the parish of Concordia could collect when plaintiff entered into his contract with defendant. The municipal law of the state which binds the parties to perform their agreement constitutes the obligation of a contract. These laws existing at the time of the contract must govern and control the contract in every shape in which it is intended they should bear on it, whether they affect the validity or construction of the contract.

§ 1510. *Jurisdiction is given the circuit courts in all cases involving federal questions by the act of March 3, 1875.*

The jurisdiction of this court cannot be tested, as it applies to this case, by the jurisprudence of the state courts, however much in the cases cited they may have sought to restrain the effect of the state statutes enacted subsequently to the date of plaintiff's contract. The state courts, of course, have ample power to try this case, or any other suits involving an interpretation of their statutes or constitution, and before the act of March 3, 1875, had original juris-

diction over such cases as this, to the exclusion of the federal courts. It is now conceded that that act is constitutional, and that congress intended under its operation to extend to the circuit courts of the United States all the judicial power which congress could, under the constitution, confer on such courts. The act enables this court to try, concurrently with the state courts, all suits of a civil nature at common law or in equity, involving over \$500, "arising under the constitution or laws of the United States." Before the passage of the act of 1875 the supreme court only could, under its appellate power, examine and revise the decisions of the highest state courts when they, in a final judgment, passed on a "title, right, privilege or immunity specially set up or claimed by either party under the constitution of the United States."

In such cases, when the judgment was against the title, right or privilege, the cause could go up on writ of error to the supreme court. Now it is no longer necessary, in order to reach the federal court, that a suitor, setting up any such right or privilege, should begin his action in the state courts. Such a right, privilege or immunity makes up a federal question, and if his suit involves such a question he may begin it in this court. The act of March 3, 1875, made some radical changes in the practice and jurisdictional powers of the circuit courts. The effect and extent of the change has not been fully realized, nor has the act, as yet, been comprehensively interpreted by the supreme court. One of the objects of the act, obviously, was to open the circuit courts to suitors claiming rights under the federal constitution and laws, and to enable such litigants to reach the courts of the United States without the tedious and oftentimes difficult process of an appeal on writ of error to the supreme court. May it not be a fact that all suits involving a federal question, which, prior to the act of 1875, could have been taken up on writ of error from the state courts of last resort to the supreme court, may now be filed and tried originally in the circuit courts? Certainly the counsel favoring this motion has fallen far short in his estimate of the changes made by this act of 1875.

§ 1511. *Jurisdiction depends upon the cause of action. If this contain a federal question, the court has jurisdiction even though the defense may make the issues only upon other questions of fact, conceding the federal question.*

It must be admitted as true that plaintiff entered into the contract as alleged; that act No. 69, giving him certain remedies, and section 2743, R. S., existed at the date of his agreement; that the act, No. 96, 1877, and article 209 of state constitution, repealed the two statutes, No. 69 and section 2743. The motion to the jurisdiction cannot put at issue these facts as plaintiff alleges them. The constitution of the United States prohibits the impairment of the obligation of a contract. It does not, in such a way, protect the obligation of an ordinary debt. If his cause of action was to enforce the collection of an account or an ordinary debt, then the allegation that certain laws affecting his remedy had been repealed would not present a federal question. His right to sue in this court attaches at once if he has presented such a question. It must depend on the subject-matter of his suit.

In *Osborn v. Bank of United States*, 9 Wheat., 824, the court says the right to sue "is anterior to the defense, and must depend on the state of things when the action is brought." Can his right to sue depend on anything else? If the jurisdiction depends on or could be ousted by the character of the defense, or was limited by the denials in defendant's answer, should he file one, or by the matter or facts he should choose to put at issue, then it is apparent that the

ingenuity of counsel would have much to do with confirming or denying jurisdiction. If it depended on the jurisprudence of the state courts, on similar issues to those involved in the case at bar, the power in this court to try such cases as this one would often rest on the opinions of the state judges. In this connection, it was suggested that defendant's answer, when filed, might admit the execution of the contract agreement, and put at issue only the question of performance on Sawyer's part. Then, on this limited issue, no federal question would have to be passed on, adversely or otherwise, by any court trying the case. This suggestion is answered in case of *Railroad Co. v. Mississippi*, 102 U. S., 140, and in a number of cases of recent date. In the case noted the court said, speaking of the matter of jurisdiction:

"It is not sufficient to exclude the jurisdiction of the judicial power of the United States from a particular case that it involves questions which do not at all depend on the constitution or laws of the United States, but when a question, to which the judicial power is extended by the constitution, forms an ingredient of the original cause, it is within the power of congress to give the circuit court jurisdiction, although other questions of fact may be involved in it."

In *Mayor v. Cooper*, 6 Wall., 253, the court, discussing the same question, said: "Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exists—if there be a single such ingredient in the mass—it is sufficient. That element is decisive upon the subject of jurisdiction."

Chief Justice Waite, in the case of *Gold Washing & Water Co. v. Keyes*, 96 U. S., 203, said: "The suit must, at least in part, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved." In *Osborn v. Bank*, 9 Wheat., 822 (Const., §§ 2363-87), it is said the case arises under the constitution when "the title or right set up by the party may be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction."

§ 1512. *A federal question arises when the court, in pronouncing judgment, must necessarily construe the constitutional provision as to impairing the obligation of a contract.*

It is clear that a federal question, or the ingredient of one, would not have to be passed on if plaintiff was suing on an obligation growing out of a debt or an account. But he sues on a contract, and invokes the protection of the constitution; and it seems that no exigible judgment could be given in his favor on any of the issues involved, unless the court pronouncing judgment should construe, one way or another, the article of the constitution prohibiting the impairment of the obligation of a contract. The repealing acts and article of the state constitution which have impaired his remedies must be annulled and put at naught, so far as they affect anterior contracts, before any exigible judgment can be given to plaintiff. The original cause of action consists of a demand for the enforcement of the contract, and of a demand for and exigible judgment for the money due him. The "title or right he sets up for such a judgment cannot" be passed on without recognizing an existing "controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved." Unless an exigible judgment can be obtained, his suit in the state court would be an idle formula and a vain ceremony. Execution is the very life of a judgment; and now, under the act of 1875, he has a

right to go into a court that has the power to give him an exigible judgment on all parts of his claim, if well founded.

The Louisiana cases cited by defendant's counsel show the existence of a distinctive constitutional question in this case. In the case of *Folsom v. City of New Orleans*, 32 La. Ann., 714, the court said, speaking of the repealing act, No. 96, 1877, and of the effect of article 209, state constitution, that "no court has the right to question the validity of any article of a state constitution, except on the ground that it violates the constitution of the United States."

In the other cases the same principle was announced, and in all the cases the court held that act No. 69 was repealed, and that act No. 96, 1877, and article 209, would be valid against everybody but for the restraining effect which this construction of the paramount law exercised upon the validity of the act No. 69, and article 209. In all the cases cited it is apparent that the state court was constrained to recognize the existence of a constitutional question, and to give judgment accordingly. In all of these suits, where a contract was established, the courts protected the claimants on the ground that, in their opinion, the statute of 1877 and article 209 of state constitution violate the constitution of the United States. Plaintiff can, if he chooses, institute his suit in the state court, and all the elements of the cause of action, if well founded, could be sustained by an exigible judgment; but it is equally as clear to me that no exigible judgment could, in any court, state or federal, be given to him, unless the laws of which he complains as affecting his remedy are declared void, as against him, because of their repugnancy to the constitution of the United States. I think the jurisdiction of this court covers the subject-matter of his suit. Motion overruled.

STANLEY *v.* BOARD OF SUPERVISORS OF ALBANY COUNTY.

(Circuit Court for New York: 19 Blatchford, 147, 148. 1881.)

§ 1513. *A suit to enforce a right given by congress in regard to taxation of bank shares is a suit arising under the laws of the United States, and is within the jurisdiction of the circuit court.*

Opinion by WALLACE, J.

The court has jurisdiction of this action, notwithstanding the plaintiff's assignors are citizens of this state, because this is a suit arising "under the laws of the United States," within the meaning of the act of congress of March 3, 1875 (18 U. S. Stat. at Large, 470), respecting the jurisdiction of circuit courts. The action is to enforce a right conferred upon the plaintiff and his assignors by section 5219 of the Revised Statutes of the United States, regarding the taxation of property in the shares of national banking associations. As was said by Chief Justice Marshall, a case "may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either" (*Cohens v. Virginia*, 6 Wheat., 379; §§ 734-45, *supra*), or where the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. *Osborn v. Bank of United States*, 9 Wheat., 822 (CONST., §§ 2363-87). The right of the plaintiff depends upon the construction of section 5219. If that section is meant to interdict such an assessment as that of which the plaintiff complains, his right is sustained by a construction to such effect, and will be defeated by the opposite construction.

§ 1514. *The entire judicial power, in cases under the constitution or laws of the United States, is intended to be conferred by act of March 3, 1875.*

The act of 1875 employs the identical phraseology by which the constitution defines the grant of judicial power which congress may confer upon the inferior federal courts, and, I cannot doubt, is intended to confer the grant to the full extent authorized by the constitution. Judgment is ordered for the plaintiff.

SEYMOUR v. PHILLIPS & COLBY COMPANY.

(Circuit Court for Illinois: 7 Bissell, 460-465. 1877.)

STATEMENT OF FACTS.—Action on a *supersedeas* bond, in the court in which the bond was given. There was a plea to the jurisdiction on the ground that all the parties were citizens of the same state.

Opinion by DRUMMOND, J.

The question is, whether, in consequence merely of the suit being upon a bond given under the circumstances mentioned, this court has jurisdiction of the case independent of the citizenship of the parties; and I am inclined to think that it has.

§ 1515. *The circuit court has jurisdiction of a suit upon a supersedeas bond given in that court, as arising under the United States law under which the bond was given.*

So far as I have been able to investigate the subject, I am of opinion that this court has jurisdiction, on account of the nature of the controversy. I leave out of view one very strong aspect of the case, which was presented by the counsel for the plaintiffs, namely: that growing out of the fact that this may, in one sense, be said to be an incident of the original suit—something inseparably connected with it,—and that owing to that circumstance alone, independently of the nature of the controversy, the court might have jurisdiction precisely as it would of a bill filed (connected with a judgment at law) on the equity side of the court, of which, as is well known, the court has jurisdiction, irrespective of the citizenship of the parties. Waiving that view of the case at present, I think the nature of the controversy is such as to give the court jurisdiction.

Section 1000 of the Revised Statutes of the United States, which re-enacts a provision of the act of 1789, declares that when a judge signs a citation on any writ of error, “he shall take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where a writ is a *supersedeas*, and stays execution; of all costs only where it is not a *supersedeas*, as aforesaid.” This does not prescribe the particular form of the security. In practice, the security has uniformly been, under this statute, a bond given by the party in the usual form, and because it is such a bond, the defendants contend that the obligations growing out of the bond are of a common law character, and really give rise to no question under the laws of the United States. But it is clear that in one sense the obligation must be determined by the law of the United States, namely, this statute—“If he fail to make his plea good he shall answer all damages and costs.” Now what are those damages and costs must be determined by a construction to be given to this statute, because it is this statute which constitutes the measure of damages, and is the law governing the rights of the parties. Section 1007 of the Revised Statutes is sub-

stantially the same as the act of 1789, amended by the act of the 18th of February, 1875, after the passage of the law authorizing an extension of time to sixty days, to give the bond.

§ 1516. *A rule established by the United States supreme court, in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself.*

What is the law upon the subject can be further ascertained by referring to rule No. 29, adopted by the supreme court of the United States. A rule established by the supreme court of the United States, in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself, and where the court prescribes a rule as to the kind of indemnity that shall be given, then it becomes a rule under the law, and, substantially, a law of the United States. Now this was a *supersedeas* bond, and the rule is this: "*Supersedeas* bonds in the circuit courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal," etc. Whatever questions there are must arise under the law and under this rule. Whenever any question comes up in a controversy between parties upon a bond thus given, what court is to decide it;—what was the intention of the law in relation to the determination of that controversy? Is it not manifest, that if it be true that a state court may have jurisdiction of the case, it is only concurrent with the jurisdiction of the federal court, and that the federal court is peculiarly the tribunal that ought to decide all such questions, because they are questions that arise under the acts of congress, or under rules of court passed in pursuance of acts of congress; and is it not also manifest that if a state court took jurisdiction of such a controversy, that it might ultimately, under the law or under the rule, be carried to the supreme court of the United States? And that position was not seriously controverted in the argument. If that is so, how can the court say, upon the declaration of the bond, that there may not necessarily arise some question which is not a mere common law question, but may become a question under the statutes or under the rule; and must it affirmatively appear, before the court can take jurisdiction of the case, that there will be necessarily a question arising under the statutes or under the rule?

§ 1517. *From the fact that a bond was given under an act of congress, it does not necessarily follow that the circuit court has jurisdiction, if it appear that no question does arise under the act.*

It was said, and perhaps that constituted the strongest argument on the part of the defense in presenting the demurrer, that it did not follow, because there was a contract made under an act of congress, or a bond given, that therefore the federal court could necessarily take jurisdiction of the case. Perhaps that is so. The case of *Wilson v. Sandford*, 10 How., 99 (APPEALS, § 602), was a case where there was a contract made growing out of a patent right, and the court held, where the question was whether or not the supreme court of the United States had appellate jurisdiction in the case, that it had not, because it affirmatively appeared that there was no question arising under the patent law; that it was simply a contract made in relation to a patent right, all questions connected with which were to be determined independently of the statute upon the subject of patents.

Now, if it affirmatively appeared in this case that it was so; if, in other

words, it did appear that there was no question arising in this case, either under the act of congress or under the rule of the court, then it might be brought within this decision; but it is manifest that, if the question had been in relation to the validity of the assignment of a patent right, then it would necessarily come within the jurisdiction of the federal court, because it would be a question arising under an act of congress covering patent rights, and I apprehend that the supreme court in this case does not intend to intimate that if such a question had come up on the validity of an assignment, as authorized by an act of congress, that the court would not have had appellate jurisdiction of the case, although the amount in controversy might not have been \$2,000 — the supreme court of the United States having jurisdiction independently of the amount in controversy in patent cases.

The first section of the act of the 3d of March, 1875, which we have had occasion so often to examine since it was passed, declares that "circuit courts of the United States shall have original cognizance, concurrently with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States." Now, is this not a matter in dispute arising under the laws of the United States, as it is presented upon the face of the pleadings? It is an indemnity given in pursuance of a law of the United States; the measure of the liability of the party, and the rights both of the plaintiffs and the defendants, depend upon a law of the United States and a rule of the supreme court of the United States. It is impossible to take a step in the progress of the cause in order to determine the rights of the parties, without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case. From the best consideration that I have been able to give this case, therefore, I think that the court has jurisdiction. It is a little singular that no case precisely in this form has been reported.

§ 1518. *A suit on a supersedeas bond is in one sense an incident of the original suit.*

The argument *ab inconvenienti* is not without weight in determining this question. It is a controversy springing out of a suit already determined in the federal court. It is in one sense an offshoot of that suit. It would seem upon principle that this is the proper forum to settle all controversies growing out of that suit. If it were a question connected with an execution, and a bill had been filed, as already stated, this court would be the proper forum to determine any such controversy. This is a bond growing out of that suit; it would seem that this is the proper forum to settle all controversies connected with the execution of the bond and the rights of the parties, particularly as to the liabilities of the obligors to the bond; so that, conceding that it may in one sense be considered a new question, I feel inclined to establish a precedent that the federal court is the proper forum to settle the rights of the parties.

The demurrer, therefore, to the plea in abatement will be sustained, reserving the right to the defendants to move in arrest of judgment.

DOWELL v. GRISWOLD.

(Circuit Court for Oregon: 5 Sawyer, 39-44. 1877.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This action was commenced on October 1, 1877, to recover from the defendant the sum of \$2,081.32, as money had and received

by him to the use of the plaintiff. The complaint alleges that the plaintiff is a citizen of Oregon, and the defendant of New York.

The cause of action appears to have arisen as follows: The United States being indebted to sundry persons for services and supplies furnished to the expedition of 1854 to aid the emigrants on the southern route to Oregon and in the Oregon Indian war of 1855-6, employed the plaintiff to collect the same, giving him a power of attorney for that purpose, and agreeing that he should have a certain portion of whatever he might obtain upon such claims in full satisfaction of his services and expenses on that account. In pursuance of such authority and agreement, the plaintiff performed valuable services in that behalf, and did all that was necessary to secure the allowance and payment of such claims, when the defendant with full knowledge of the facts fraudulently purchased said claims of said persons, and conspired with certain officers of the treasury department to prevent said plaintiff from obtaining payment of the same, and thereby was enabled to and did collect them himself, and recovered and retained that portion belonging to the plaintiff as compensation for his services and expenses as aforesaid. The defendant pleaded in abatement that he is not a citizen of New York, but is, and prior to this action was, a citizen of Oregon. The plaintiff demurred to the plea, and assigned as cause of demurrer: 1. That the plea does not state facts sufficient to constitute a defense. 2. "That the plea, if true, would not oust the court from jurisdiction in this action, as the complaint avers other complete jurisdictional facts."

The "other complete jurisdictional facts" is an allegation in the complaint that the cause of action arises under the laws of the United States, and necessarily involves the construction of two certain acts of congress therein named, to wit, the act of July 17, 1854 (10 Stat., 307), providing for the payment of the expenses of the Rogue river Indian war of 1853, and the act of February 2, 1871 (16 Stat., 401), providing, among other things, for the payment of the expedition aforesaid to aid the emigrants.

§ 1519. *An allegation that the cause of action involves the construction of acts of congress is a conclusion of law. It should show how it involves such construction.*

Assuming that "complete" facts are only facts, the question made by the demurrer is, whether or not this action arises under a law of the United States. The constitution (article 3, section 2) provides that "the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." By the act of March 3, 1875 (18 Stat., 470), this judicial power was first fully vested in the circuit courts in all cases of original cognizance where the matter in dispute exceeds the value of \$500. The allegation in the complaint that the cause of action arises under the laws of the United States, and necessarily involves the construction of certain acts of congress, is only a conclusion of law. Unless the facts stated show how it arises under such laws, the allegation is insufficient to confer jurisdiction by reason of the character of the cause without reference to that of the parties.

Upon the facts stated it cannot be said that this action arises under either of the acts of congress mentioned in the complaint, and no other has been suggested out of which it could arise. The indebtedness on the part of the United States to the several persons for whom the plaintiff was acting as agent may be said to have arisen out of these acts. By them the United States recognized and assumed the payment of their several claims, or so much thereof

as might be found “just and equitable.” But the liability of the defendant in this action grows out of his alleged misconduct in obtaining for himself from the United States, contrary to equity and good conscience, the portion of such indebtedness which belonged to the plaintiff as a compensation for his services and expenses rendered and incurred in and about the same; or, as was said by this court in *Dowell v. Griswold*, April 1, 1877 [5 Saw., 23]: “Griswold’s liability arises out of his own conduct—the obtaining this money from the United States, upon which the plaintiff had a lien, if not by fraud, at least wrongfully and with notice of the facts.”

§ 1520. *Quære: What is a case arising under the constitution and laws.*

This act is of recent date, and no case has been cited giving construction to its language, “arising under the constitution or laws of the United States.” But similar language contained in the patent act of July 4, 1836, has been repeatedly held not to confer jurisdiction of suits between patentees and third persons growing out of the dealings and contracts of the parties thereto, with reference to the subject of the patent. Section 17 of that act (5 Stat., 124) provided: “That all actions, etc., arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States,” etc.

In *Wilson v. Sandford*, 10 How., 100 (APPEALS, § 602), it was held by the supreme court that a suit to set aside a contract for the use of a patent—Woodworth’s planing machine—and to obtain an injunction against the future use of the same, because the contract was forfeited by the refusal of the defendant to comply with its conditions, did not arise under this act, but out of the contract of the parties concerning the subject of the patent. To the same effect is *Goodyear v. The India Rubber Co.*, 4 Blatch., 63 (§§ 1539–40, *infra*); *Nesmith v. Calvert*, 1 Woodb. & M., 37, and *Blanchard v. Sprague*, 1 Cliff., 298.

But it is also alleged as a ground of jurisdiction that the trial of this action will “necessarily involve” the construction of the acts of congress aforesaid. Whether this is so or not at this stage of the proceedings cannot be told. But in my judgment an action cannot be said to arise under a law of the United States simply because its construction in some respect is or may be incidentally involved in the trial of it.

For instance: In an action between citizens of the same state upon any ordinary contract, a transcript of the record of the judgment of a sister state may be offered in evidence to prove that the matter is *res judicata*, and thereupon the question may arise whether the same is authenticated in the manner prescribed by the law of the United States on that subject. 1 Stat., 122; sec. 905, R. S. The determination of this question necessarily involves the construction of the national law. But it can hardly be contended that under the act of 1875, *supra*, whenever such a question is liable to arise in any action, it may, therefore, be brought in the circuit court of the United States, without reference to the character of the parties, as a case arising under the laws of the United States. Such a case does not arise under a law of the United States, but the contract of the parties and the general principles and rules of law applicable to such transactions. The supposed question arising in the course of the trial under the United States law is only incidental, and, at most, contingent upon circumstances which do not lie at the bottom of or affect the real merits of the case.

Of course the judicial power of the United States extends to such questions, but it would appear that the only mode yet provided for its exercise is by an appeal to the supreme court from the final judgment of the state court, as provided in section 25 of the old judiciary act. Sec. 709, R. S. Indeed it is not apparent how else it could be exercised than upon appeal, as in many, if not most, of such cases, it is impossible, or at least very inconvenient, to foresee and determine in advance whether any such question will arise or not.

I know that in *Cohens v. Virginia*, 6 Wheat., 378 (§§ 734-45, *supra*), the supreme court, in construing the language of the constitution defining the judicial power of the United States, ruled that a case "may truly be said to arise under the constitution or law of the United States whenever its correct decision depends upon the correct construction of either;" and that upon this authority, which has never been shaken, a case which involves a question depending for its solution upon the proper construction of a law of the United States is a case arising under such law, and therefore within the judicial power of the national government.

§ 1521. *Semble, that under the act of March 3, 1875, a case does not arise under an act of congress unless the right of the party has its origin in that act.*

But the court was construing this language with reference to the extent of the grant of such power and its appellate jurisdiction under section 25, *supra*, which expressly includes a case where, upon a trial in a state court, a question arises under a law of the United States, and is decided adversely to the plaintiff in error. The jurisdiction conferred upon this court by the act of 1875, *supra*, in cases arising under a law of the United States, is, however, original and not appellate. A case does not arise under such a law within the scope of that jurisdiction, unless the very right of the party springs out of or has its origin in such law. As was said by the supreme court in the case of *Osborn v. United States Bank*, 9 Wheat., 824 (CONST., §§ 2363-87): "The questions which the case involves must determine its character, whether these questions be made in the cause or not."

As the law stands, if in the progress of any case it appears that the right of either party or the mode of establishing or enforcing it incidentally touches upon or is upheld or limited by a law of the United States, so far and thenceforth it becomes a case arising under such law, and therefore falls within the purview of the judicial power of the United States. How this power is to be exercised in such a case is a question for congress. Doubtless it may provide that it shall be exercised by the circuit courts on appeal from the final judgment of the state court, or that the action may be commenced in or removed to such courts upon a showing that a question arising under a law of the United States, and necessary to its determination, is involved therein. *Osborn v. U. S. Bank*, 9 Wheat., 738 (CONST., §§ 2363-87); *Story on Con.*, sec. 1648; *The Federalist*, No. 82.

But as at present advised, it appears to me in the light of the ruling in *Wilson v. Sandford*, *supra*, that no provision has yet been made for the exercise of the judicial power of the United States in such a case by an original proceeding in the circuit court. It does not appear, from the statement of the plaintiff's case, how his right arises under a law of the United States, or that even any question under such law will arise in the progress of the trial. Demurrer overruled.

At the same time that the demurrer was submitted, the issue of fact made by the plea in abatement was submitted to the court for trial without the

intervention of a jury. Upon the evidence, I find that the plea is true, and that the defendant at the commencement of this action was a citizen of Oregon.

§ 1522. **Conferred only by act of congress.**—The circuit court of the United States has only such portion of the jurisdiction given by the constitution to the federal courts as congress by its statutes has conferred upon it. *United States v. New Bedford Bridge*, 1 Woodb. & M., 437.

§ 1523. **Seizures under revenue laws.**—Federal courts have exclusive jurisdiction of seizures under revenue laws, whether made on land or water. *Slocum v. Mayberry*, 2 Wheat., 9.

§ 1524. **Bridge over navigable waters.**—The United States circuit court has jurisdiction of a suit brought to enjoin the construction of a bridge over navigable waters, only so far as to see that such construction is not in violation of any act of congress or law of the United States. *Miller v. New York*, 13 Blatch., 470.

§ 1525. **The act of incorporation of the Bank of the United States**, giving it authority to sue in the circuit court of the United States, is constitutional; and a suit by the bank is one arising under a law of the United States. *Osborn v. Bank of United States*, 9 Wheat., 818 (CONST., §§ 2363-87).

§ 1526. **State law impairing obligation of contracts.**—Where a state has granted a charter to a lottery company, and subsequently enacts a law which impairs the obligation of its contract entered into under the charter, this constitutes a question arising under the constitution of the United States, and the circuit court of the United States has jurisdiction of a case involving such a question, under the act of March 3, 1875. *State Lottery Co. v. Fitzpatrick*, 3 Woods, 239.

§ 1527. **Condemning land for federal building.**—An act of congress which authorizes and directs the secretary of the treasury to purchase a site for a building to be used as a post-office, court-house, etc., is an exercise of the right of eminent domain by the United States. As this right is a common law right, and as a proceeding to enforce it is a suit at law, the circuit court of the United States has jurisdiction of the case, under the provision of the judiciary act of 1789, giving the circuit court jurisdiction when the United States, or any officer thereof suing under the authority of any act of congress, are plaintiffs. *Kohl v. United States*, 1 Otto, 371.

§ 1528. **The question whether an act of the District of Columbia is ultra vires** is a question arising under the laws of the United States. *Hay v. Railroad Co.*, 4 Hughes, 331 (§§ 280-283).

§ 1529. **Writs of error and certiorari to state courts.**—Suit was brought by the state of Illinois, in a state court, against a railroad corporation to enforce a penalty for the violation of a state statute against discriminating rates. The railroad sued out a writ of *certiorari* from the United States circuit court. In that court the question of jurisdiction was raised, and it was held that the circuit court had no jurisdiction under the writ. *Illinois v. Chicago & Alton R. Co.*, 6 Biss., 107. As to federal questions, or cases arising under the constitution and laws, see APPEALS, VI.

4. *Patents and Copyrights.*

[See PATENTS; TRADE-MARKS AND COPYRIGHTS.]

SUMMARY — *What is a case arising under the patent laws*, § 1530.—*Violation of a contract relating to a patent*, § 1531.—*Breach of covenant by licensee*, § 1532.—*Trade-marks*, § 1533.

§ 1530. Complainant sets out a contract with defendants for use by the latter of his invention, and states that the contract is partly performed, but that defendants have refused to carry it out, and that he has thereupon forbidden them to use his process, and charges them as infringers. Defendants admit the validity of the patent, and their liability under the contract, and state that they have performed the contract as they understand it. *Held*, that this is not a case arising under the patent laws, but that the suit is founded on the contract. (Three judges dissenting.) *Hartell v. Tilghman*, §§ 1534-37.

§ 1531. A suit upon the violation of a contract relating to a patent is not a case arising under the patent laws, within the jurisdiction of the federal courts. *Goodyear v. Day*, § 1538.

§ 1532. One using a patented invention under a license from the owner, and keeping within its terms, can violate no right secured by the patent laws, thus giving the federal courts

jurisdiction. A breach of his covenants is merely a violation of common law rights, and the case, aside from the question of citizenship, is cognizable only by the state courts. *Goodyear v. Union India Rubber Co.*, §§ 1539-40.

§ 1533. The trade-mark law is in a fair sense a part of the copyright law, and suits for infringement are within the jurisdiction of the circuit courts. *Duwell v. Bohmer*, § 1541.

[NOTES.— See §§ 1542-1565.]

HARTELL *v.* TILGHMAN.

(9 Otto, 547-560. 1878.)

APPEAL from U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the eastern district of Pennsylvania, in which Tilghman, the appellee, describes himself in his bill as a citizen of that state, and the defendants as citizens of the same state. It thus appears affirmatively that, if the court had jurisdiction of the case, it was for some other reason than the citizenship of the parties; and it is argued by appellants that there is no such other ground for the jurisdiction. The counsel for appellee, however, insists that it is “a case arising under the patent laws of the United States,” and therefore cognizable in the circuit courts of the United States on account of the subject-matter of the suit. Subdivision 9 of section 629 of the Revised Statutes, which section is devoted to a definition of the powers of that court, gives it original jurisdiction “of all suits at law or in equity arising under the patent or copyright laws of the United States.”

This section of the revision is founded on section 55 of the act of July 8, 1870, which declares that all actions, suits, controversies and cases arising under the patent laws of the United States “shall be originally cognizable, as well at law as in equity, in the circuit courts of the United States;” and that those courts shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and on a decree for infringement complainant shall be entitled, in addition to profits, to the damages he has sustained thereby. The language of the act of 1836 is substantially the same, except as to the damages to be recovered. We are, therefore, to decide whether this suit is one arising under the patent laws of the United States, within the meaning of the clause we have cited.

If a man owning a tract of land, his title to which is a patent from the United States, should sell or lease that land, and a controversy should arise between him and his vendee or lessee as to their rights in the premises, it could not be said that any suit brought by the vendor to assert his rights was a suit arising under the land laws of the United States; and this would be beyond question if the defendant, admitting the title of plaintiff to the land, should make no other defense than such as was founded in rights derived from plaintiff by contract. That is the case before us, with the variance that plaintiff's title is to a patent for an invention instead of a patent for land. His bill begins by a statement that he is the original inventor and patentee of a process for cutting and engraving stone, glass, metal and other hard substances. It is the one known as the sand-blast process.

He then sets out what we understand to be a contract with defendants for the use by the latter of his invention. He declares that defendants paid him a considerable sum for the machines necessary in the use of the invention, and

also paid him the royalty which he asked, for several months, for the use of the process, which he claims to be the thing secured to him by patent. He alleges that after this defendants refused to do certain other things which he charges to have been a part of the contract, and thereupon he forbade them further to use his patent process, and now charges them as infringers. The defendants admit the validity of plaintiff's patent. They admit the use of it and their liability to him for its use under the contract. They set out in a plea the contract as they understand it, and the tender of all that is due to plaintiff under it, and their readiness to perform it.

What is there here arising under the patent laws of the United States? What controversy that requires for its decision a reference to those laws or a construction of them? There is no denial of the force or validity of plaintiff's patent, nor of his right to the monopoly which it gives him, except as he has parted with that right by contract.

The complainant's view of the case is that there was a verbal agreement that he should prepare and put up in defendants' workshop ready for use such parts of the machinery as were of special use in his invention, for which defendants were to pay him at all events. That after this was done defendants should take a license for the use of his invention; that this license was to be the same in its terms as that given to all other persons who used the process, and among these were the right on the part of the patentee to visit the works of the defendants at all times, as well as to inspect their books, with a view to ascertain the amount of work done on which royalty was due. Also, that once every year the complainant had a right to fix the tariff of rates to be paid by defendants, by increasing it if he so determined, with no other limitation than that the increase of rates should apply equally to all licensees of the patent.

It is established by evidence of which there is no contradiction that complainant did furnish and put in place the machines, for which defendants paid him \$649. That complainant also furnished a schedule of the rates of royalty to be paid on the different kinds of work to which the patented process was to apply, and that defendants made monthly returns and monthly payments according to this schedule, which were received by plaintiff without objection. That besides the machinery purchased of plaintiff, the defendants had expended about \$3,000 in erecting a blower for the use of the sand-blast of complainant's process. At this stage of the affair complainant tendered to defendants two blank forms of license to be signed by both parties, containing the two conditions we have mentioned. After some fruitless negotiations, defendants refused to sign these papers, and complainant thereupon, as we have said, forbade them to use the process, and on their disregard of this admonition brought his bill in chancery for an injunction, and for an account of profits and additional damages.

The argument of counsel is that defendants, having refused to sign the papers tendered them, are without license or other authority to use his invention, and are naked infringers of his rights under the acts of congress. The defendants say that they never agreed to accept a license with the conditions we have mentioned in them; that they never agreed to permit complainant's agents to inspect all the processes of their own works, some of which were valuable secrets, nor, after they had expended thousands of dollars in preparations for the use of his process, to place themselves under his arbitrary control as to the prices they should pay for the use of his invention. And they say that when

the machines were in full operation and paid for, and the schedule of rates had been furnished by complainant and accepted by them, the contract was complete, and needed no such written agreement as the one tendered them for signature.

§ 1534. *A federal court has no jurisdiction of a case as involving patent law, when defendant concedes the validity of plaintiff's patent and claims the right to use it under a contract with him. Authorities reviewed.*

Such were the pleadings and the principal conceded facts on which the court was called to act, and we pause here to consider the question of jurisdiction on the case thus stated. *Burr v. Gregory*, 2 Paine, 426, one of the earliest cases on this subject, was a bill to procure a decree that the assignment of a patent by Burnap to Gregory was to the extent of three-fifteenths for the benefit of complainant Burr, and to have a conveyance executed accordingly. Mr. Justice Thompson said that if the validity of the patent or of the assignment could be drawn in question, the circuit court might have jurisdiction. But as it was a matter which grew out of the contract, and there was no averment of citizenship, the amount prayed for, growing out of the profits, did not vary the case so as to give jurisdiction. This decision was made before the act of 1836, but is indicative of the sound doctrine that controversies arising out of contracts concerning patent-rights did not necessarily belong to the federal courts.

The next case in chronological order was founded on the act of 1836, the language of which, as we have seen, was on this point preserved in the act of 1870, and is embodied in the Revised Statutes. It is the only authoritative construction of the statute on that point made by this court, except *Littlefield v. Perry*, 21 Wall., 205, which is in accord with it, and we think it covers the case under consideration. We refer to *Wilson v. Sandford* (10 How., 99; APPEALS, § 602), and the opinion was delivered by Mr. Chief Justice Taney.

The complainant was assignee of the Woodward planing-machine patent, and had licensed the defendants to use one machine upon payment of \$1,400, of which \$250 was paid down, and notes payable in nine, twelve, eighteen and twenty-four months given for the remainder. This license contained a provision that if either of the notes was not punctually paid at maturity, all the rights under the license ceased and reverted to "Wilson, who became reinvested in the same manner as if the license had never been made." Upon failure to pay the first two notes, Wilson brought his bill, charging that notwithstanding this, the defendants were using the machine, and thus infringing his patent. He prayed an injunction, an account, etc. The bill was dismissed in the court below, and on appeal to this court the appeal was dismissed because the amount in controversy did not exceed \$2,000. If, however, it had been a case arising under the patent laws of the United States, no sum was necessary to give jurisdiction.

The precise question, therefore, to be decided was whether the suit arose under the patent laws of the United States; and the chief justice, after reciting the clause in the act of 1836 which gives the circuit courts jurisdiction in all such cases, proceeds to discuss that question in this manner: "The peculiar privilege," he says, "given to this class of cases was intended to secure uniformity of decision in the construction of the act of congress in relation to patents. Now, the dispute in this case does not arise under any act of congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of

congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction, unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not in a court of chancery depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent-rights. And whenever a contract is made in relation to them, which is not provided for and regulated by congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal."

Let us see how closely these remarks and the case to which they related apply to the present case. In that case a contract was made under which the defendant entered on the use of the invention. This is also true of the case before us. In that case it is charged that an act to be performed by the defendant and licensee under the contract was not performed, to wit, payment of the notes. In the case before us it is alleged in like manner that the defendants failed to perform part of the contract, to wit, to sign a license.

In that case the complainant asserted, as in this, that all right under the contract had ceased, and he was remitted to his original rights under the patent, and could, therefore, sue in the federal court under the statute; but the court held this to be erroneous, and that the rights of the parties depended on the contract and not on the statute. Why does not the same rule apply to the present case? Wilson's case was stronger than Tilghman's case, for two reasons: 1. Because the contract was all in writing, and there was no dispute about its meaning. Here it was in parol, and there is not only dispute about its meaning, but the rights of the parties depend almost wholly upon the points in dispute, which have no relation to the patent laws of the United States. 2. In Wilson's case there was an express provision in writing that a failure to pay any note when due forfeited the license and reinvested Wilson with all his original rights. No such provision is set up in the contract between Tilghman and the defendants.

In this case, as in that, the defendants had bought the machine and paid for it and used it. In this case, as in that, the right to its further use depended upon the contract, and was to be determined by its construction and effect. In this, as in that, the case, in Judge Taney's language, "does not arise under an act of congress, nor does the decision depend upon the construction of any law in relation to patents. The rights of the parties depend altogether upon common law and equity principles."

In *Goodyear v. Union India-rubber Co.* (4 Blatch., 63; §§ 1539-40, *infra*), where the licensees had neglected for three years to pay the royalty which they had agreed to pay, and refused to permit their books to be inspected, and where one of the prayers of the bill was that until they had so accounted and paid the royalty due they should be enjoined from the use of the invention, Judge Ingersoll held that the bill stated no case arising under the patent laws of the United States, but did not make a case for relief on the contract. Judge

Blatchford stated the doctrine still more strongly in *Merserole v. Union Paper Collar Co.*, 6 id., 356.

In the case of *Blanchard v. Sprague*, 1 Cliff., 288, decided by Mr. Justice Clifford in 1859, he said: "No dispute arises in the case under any act of congress, nor does the decision depend in any respect on any law of congress in relation to patents. On the contrary, it arises entirely out of the agreement, express or implied, for a license, and the rights of the parties depend altogether upon the ordinary rules of law. . . . What the complainant really claims is that he terminated or revoked the license under the agreement which previously existed between the parties, by giving the notice, and that the respondent subsequently continued the use of the machine without any stipulation as to the rate of tariff." How precisely descriptive of the case under consideration, in which Tilghman, claiming that he has terminated at his own option the arrangement under which the defendants had been operating, can now sue in the federal court for an infringement in violation of the acts of congress. In the case mentioned Judge Clifford held otherwise.

To the same purport is *Hill v. Whitcomb*, decided by Judge Shepley, and reported in 1 Holmes, 317. It may be conceded that the case of *Brooks v. Stolley*, 3 McL., 523, decided by Mr. Justice McLean on the circuit prior to the act of 1836, is, in some respects, opposed to the authorities we have cited. But in them it stands alone, and is not supported by the better reason.

§ 1535. *Appropriate remedies of the complainant.*

We may be asked if we concede the complainant's statement of the verbal agreement to be correct, what remedy has he on it? The answer is very easy. He can establish his royalty once every year, and sue at law and recover every month or every year for what is due. If he desires to assert his right of examining the works of the defendants, he can, in a proper case made, compel them to submit to this examination. If he desires to enforce the agreement for executing a written contract of license, he can bring a suit in equity for specific performance, and with or without that specific relief ask the court to enjoin them from using the patented process until they execute the agreement and comply with its requirements. All these and perhaps other remedies are open to him to enforce the contract. He may also file a bill in chancery to have it annulled or set aside because of the difficulties placed in the way of its fair execution by the defendants. Not content, however, with all these remedies, the complainant assumes that he has, under the condition of things he has proved, the right in himself to abandon the contract, to treat it as a nullity, and to charge the defendants as infringers, liable as trespassers under the act of congress to pay both profits and damages.

§ 1536. *Analogy of this case with action of ejectment deceptive.*

The analogy of an action of ejectment to recover possession of land in cases of a broken contract of sale is referred to. The analogy, however, is imperfect and deceptive. That action is one at law, depending on the existence of the strict legal title to land in plaintiff, and the doctrine that the right of possession follows the title. It is a peculiar action, founded on a peculiar doctrine limited to real estate, and liable to be defeated in equity by a bill for specific performance and an injunction. In the case of a patent, plaintiff does not recover any specific property, real or personal. He recovers damages or compensation for the use of his monopoly, and if he has made a bargain with the defendant, his right to rescind or annul it must depend on all the equitable circumstances of the case.

§ 1537. *When a contract is partly performed one party cannot declare it rescinded and sue on that assumption.*

Here, where he has sold and received a considerable sum for a machine of no use for any other purpose; where the defendants have spent several thousand dollars on other machinery, which is also valueless except in connection with the use of this process; where defendants have paid and plaintiff received for many months the royalty which plaintiff established, and are still ready and willing to continue payment; and where, the contract being in parol, the parties differ about one or two of its minor terms, we do not agree that either party can of his own volition declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him, or damages can be recovered for its violation. But until so rescinded or set aside, it is a subsisting agreement which, whatever it is or may be shown to be, must govern the rights of these parties in the use of complainant's process, and must be the foundation of any relief given by a court of equity.

Such a case is not cognizable in a court of the United States by reason of its subject-matter, and as the parties could not sustain such a suit in the circuit court by reason of citizenship, this bill should have been dismissed. The decree of that court will therefore be reversed, with directions to dismiss the bill without prejudice, and it is so ordered.

Dissenting opinion by MR. JUSTICE BRADLEY; WAITE, C. J., and SWAYNE, J., concurring.

I dissent from the opinion of the court in this case. I cannot see the slightest room for doubt as to the jurisdiction of the circuit court. The suit is a bill in equity which sets up letters patent issued to the complainant for a new and useful improvement in cutting and engraving stone, metal and glass; and complains that the defendants are infringing said patent by using the said process without any license therefor, and praying an injunction, and decree for profits and damages. The bill also states the fact that negotiations had passed between the complainant and the defendants for a license to use the said invention, but that the defendants had failed to comply with the conditions, and hence had no right to continue the use; but persisted in doing so. This is the substance of the bill. It is a clear case, it seems to me, "arising under the patent laws of the United States," and is, therefore, properly cognizable by the circuit court of the United States under section 629, article 9, and sections 4919 and 4921 of the Revised Statutes, and the laws from which that article and those sections were compiled. The cause of action, or ground of relief, is the infringement of the patent. The plaintiff chooses to place himself on that ground alone. By doing so he runs the risk of any defense which would show a right to use the invention, whether license from himself, invalidity of the patent, non-infringement, or any other proper defense to a suit on a patent. He states in his bill, as he had a right to do by the rules of equity pleading, what the supposed defense would be, and answers it. This anticipation of the defense does not change the nature of the suit in the least. Perhaps he need not have anticipated the defense, but might have left the defendants to develop it in their answer. Certainly in that case the character of the defense would not have ousted the court of its jurisdiction. If a cause of action is cognizable by the United States court, the defendant cannot oust that jurisdic-

tion by his defense to the action. He may defeat the action, but he cannot destroy the jurisdiction.

It will not do to say that the remedy of the complainant was a bill for a specific performance of the parol agreement that the defendants would take a license. Perhaps he had such a remedy. But he did not choose to pursue it. He waived it by suing as for an infringement. He chose to take the responsibility of having a right to put an end to the agreement without juridical aid. Having done this, his only remedy was to sue on the patent as for an infringement. He certainly had a right to do this. He was not bound to sue for specific performance. Nor was he bound to sue for the avoidance of the supposed agreement. It may be that it would have been his better remedy. It may be that the result of the negotiation is to create a defense to the suit for infringement, amounting to a parol leave and license, or a license in law. If so, he has only made a mistake in suing as for an infringement of his patent, and may fail in his action. How that may be it is unnecessary now to inquire, since the majority of this court has decided the case on the question of jurisdiction. But whether it be so or not, the character of the present suit is not changed, as a suit for injunction and damages for the alleged infringement.

How, I would ask, could a state court have determined this suit? Suppose the defense of license, express or implied, had failed, what would the state court have done? Could it have taken an account of profits? Could it have assessed damages for the infringement? Could it have granted an injunction to restrain the defendants in the use of the invention? This would have been a new branch of jurisdiction and inquiry for it to have assumed. It is too obvious for argument, as it seems to me, that no state court has, or could rightfully take, jurisdiction of the suit. It is perfectly well settled, I admit, that where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws. But where infringement of the patent is the ground of action, and redress is sought therefor, the case does arise under the patent laws, and is cognizable in the federal court,—no matter what collateral issues may be raised by the defendant. He may set up that the patent is void, that he does not infringe, that he has a license, or a release, or what not; the federal court is fully competent to try any of the issues thus made.

The case principally relied on by the majority of the court is that of *Wilson v. Sandford*, 10 How., 99 (APPEALS, § 602). But there the bill prayed to have the license declared void. The chief justice said: "The object of the bill is to have this contract set aside, and declared to be forfeited, and the prayer is that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by this court, and for an injunction." In such a case it may be that relief is properly to be sought in the state court. But if the question were a new one, I should think that where the complainant seeks damages for infringement and an injunction against the use of the invention, making that the basis of his suit, it would not be improper, nor oust the jurisdiction of the federal court, to join in such a bill, as ancillary to the principal relief sought, an application to avoid an inequitable license held by the defendant. I see nothing incongruous in the joinder of such matters in the bill. It seems to me that the views on this subject, expressed in *Brooks v. Stolley*, 3 McL., 523, are perfectly sound and just. There the complainant had given a license to use a patented invention, determinable on non-

payment of the royalty. On failure to pay he filed his bill for an injunction and damages, at the same time stating the granting of the license, and the failure to perform the conditions of it. Mr. Justice McLean said: "It is suggested that, as the whole controversy in the case arises under the contract of license, the parties to which being citizens of this state, the federal court cannot take jurisdiction. This objection would be unanswerable, if no right were involved in the controversy except what arises out of the contract, as, for instance, the circuit court could take no jurisdiction under the contract of an action, merely to recover the sums agreed to be paid by the defendant; but in the present aspect of the case, it is not limited to the contract. The complainants set up their right under the patent, and allege that the defendant is infringing that right; that the license affords no justification whatever to the defendant. The right then of the complainants to an injunction is not founded by them on the contract, but on the assignment of the patent. If the object of the bill were merely to enforce the specific execution of the contract, the circuit court of the United States could exercise no jurisdiction in the case." See, also, Curtis, Patents, section 496, to the same purpose, citing this opinion.

It seems to me, with all due submission, that if we are to have regard to "the better reason," we shall find it expressed in these remarks of Mr. Justice McLean.

It may be laid down, I think, as a general principle, that where a case necessarily involves a question arising under the constitution or laws of the United States, and cannot be decided without deciding that question, it is a case arising under said constitution and laws, and may be brought, as the law now stands, in the circuit court of the United States, although other questions may likewise be involved which might be tried and decided in the state courts. I do not believe in the doctrine that the presence of a question of municipal law in a case which necessarily involves federal questions can deprive the federal courts of their jurisdiction. It is too narrow a construction of the judicial powers and functions of the federal government and its courts. But in this case the complainant asks no relief in relation to the supposed agreement between him and the defendants. He places himself solely on his rights accruing under the patent and on the defendants' infringement of them. I think, therefore, the jurisdiction of the circuit court of the United States was undoubted.

MR. JUSTICE STRONG took no part in the decision of the case.

GOODYEAR v. DAY.

(Circuit Court for New York: 1 Blatchford, 565, 566. 1850.)

STATEMENT OF FACTS.—Plaintiff and defendant had entered into an agreement adjusting certain suits concerning patent-rights. The bill in this case charged a breach of said agreement, and prayed an account. A motion was made for an injunction.

§ 1538. *No jurisdiction where neither party is a citizen of the state in which the suit is brought. A suit upon the violation of a contract relating to a patent is not a case arising under the patent laws.*

Opinion by NELSON, J.

The plaintiff is a citizen of Connecticut, and the defendant a citizen of New Jersey, as appears upon the face of the bill; and an objection has been taken to the jurisdiction of the court for the want of proper parties. The objection is

undoubtedly fatal, as, in order to give jurisdiction, the suit must be between a citizen of the state in which it is brought, and a citizen of another state. Judiciary Act of 1789, § 11; 1 U. S. Stat. at Large, 78. Here neither party is a citizen of New York, where the suit is brought.

It was attempted to sustain the jurisdiction on the ground that the suit was brought under the patent act, where jurisdiction depends on the subject-matter, without reference to citizenship or residence; and that the *gravamen* laid was the infringement of patent-rights. But there is no foundation for this position. The bill is not constructed for the purpose of presenting a question of the infringement of a patent; but is brought for the violation of a contract. We can regard it in no other light. Motion denied.

GOODYEAR v. UNION INDIA RUBBER COMPANY.

(Circuit Court for New York: 4 Blatchford, 63-70. 1857.)

STATEMENT OF FACTS.—Goodyear and Judson, his assignee, filed a bill against defendants, who had been operating under a license from Goodyear, who held several patents. The bill charged that defendants neither paid what they owed nor would they permit their books to be inspected, and prayed for an injunction and for general relief. It described the parties as William Judson, a citizen of New York, and Charles Goodyear, a citizen of the United States, residing in London, and the defendant as a corporation created by the state of New York.

Opinion by INGERSOLL, J.

Several important questions were presented on this motion, and elaborately argued by counsel. The view taken by the court of one of the questions renders it unnecessary that the others should be considered, as the result arrived at in considering that one question disposes of the case. That question is the question of jurisdiction. It is clear that the citizenship of the parties does not give the court jurisdiction. The parties plaintiffs are William Judson and Charles Goodyear. The defendants are the Union India Rubber Company. Judson is described as of the city of New York. Goodyear is described as a citizen of the United States, residing in London. The defendants are a corporation created by the laws of the state of New York, and located in the city of New York. The court, therefore, has no jurisdiction, unless the subject-matter of the bill gives jurisdiction; and it is insisted by the defendants that the subject-matter of the bill does not give jurisdiction.

By the constitution of the United States the judicial power extends not only to controversies between citizens of different states, but also to all cases in law and equity arising under the laws of the United States; and the seventeenth section of the patent act of July 4, 1836 (5 U. S. Stat. at Large, 124), under which it is claimed by the plaintiffs that the court has jurisdiction, provides "that all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon a bill in equity filed by any party aggrieved in any *such* case, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States."

§ 1539. *There can be no violation of a right secured by the patent laws by one using a patent under license from the owner. A breach of his covenants is merely a violation of common law rights, and is only cognizable by the federal court on the ground of citizenship.*

There can be no violation of any right secured to a patentee under a law of the United States giving to him the exclusive right to use the thing patented, provided such thing patented is used by a licensee under a license or grant made by the patentee upon such licensee's entering into a covenant that he will do certain things, so long as the license or grant remains in full force. If such licensee uses the patented invention beyond the limits of the license or grant, or in a way not authorized by the license or grant, then there has been a violation of a right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him. If such licensee uses the patented invention within the limits of the license or grant, and performs the covenants which he has entered into, there is no violation of any of the patentee's rights of any kind. If in the use of the thing granted the licensee does not perform his covenants, although there is by such non-performance a violation of the rights of the patentee, such violation is not a violation of the rights of the patentee as secured by a law of the United States, but a violation of his rights as secured by the covenants. He has, by the license or grant, parted with a portion of that which was secured to him by the laws of the United States, and has, in lieu thereof, taken a right secured by a covenant. If a patentee parts with the whole right secured by his patent, either for cash or upon the purchaser's entering into a covenant to pay him a certain sum of money, or to do certain other things, the patentee has, after such sale, no right vested in him secured by any act of congress. A suit to enforce the covenants would not be a case arising under a law of the United States. The use of the whole thing sold cannot be a violation of any rights of the patentee secured by the laws of the United States, so long as the deed of sale remains in full force, for he has parted with all such rights. And when a portion of the right is parted with, the rule must be the same as it respects such portion.

§ 1540. *Authorities reviewed.*

The weight of authority in adjudged cases sustains the view thus taken of this question. The case of *Woodworth v. Weed*, 1 Blatch., 165, decided in 1846, was an application for an injunction. The plaintiff had granted to the defendant a license to construct and use one of the Woodworth planing machines, for which the defendant agreed to give, and did give, five several promissory notes, in all amounting to \$400, the defendant agreeing that if either of said notes was not paid when it fell due, then the license and permission should be void, and the same should revert to the plaintiff. There is no such express stipulation in the licenses granted by Goodyear, under which the Union India Rubber Company claim. A bill was brought to enjoin the defendants from using the machine licensed, and the court ordered that an injunction should issue, as prayed for, unless the defendant paid the notes in sixty days. In that case no exception was taken to the jurisdiction of the court. The bill charged that the license had become void, and that, according to its terms and conditions, the defendant had no longer any right to use the machine, and prayed for an injunction to restrain its use. There was no prayer for the payment of the notes. The court say: "From the terms of the agreement, the license

was forfeited the moment one of the notes became due and unpaid, and it was optional with the plaintiff to resort to his remedy at common law to enforce the collection of the notes, or to treat the rights of the defendant as forfeited under the stipulation in the agreement." The plaintiff chose to do the latter, and not to seek payment for the notes.

The case of *Wilson v. Sherman*, 1 Blatch., 537, decided in June, 1850, was also a bill for an injunction against a licensee under the Woodworth patent to restrain him from a further use of the machines licensed. The only ground of objection urged by the defendant's counsel to the jurisdiction of the court was that the machines complained of were in another judicial district. The jurisdiction of the court was sustained. It appears from the opinion of the court that, as in the case of *Woodworth v. Weed*, one of the conditions annexed to the grant of license had been violated, and that, according to its terms and spirit, all right and title to use the machines licensed had become forfeited. The complaint in that case was that the defendants had done that which by the license they had no right to do. The complaint in the case now under consideration is that the defendants have neglected to do what they ought to have done.

In the case of *Goodyear v. Day*, 1 Blatch., 565 (§ 1538, *supra*), decided in October, 1850, it was held that the court had no jurisdiction of the case as presented by the bill, and that the subject-matter contained in the bill gave the court no jurisdiction; and as the court had no jurisdiction in consequence of the citizenship of the parties, the bill was dismissed. There was no prayer in that bill that the defendant be enjoined from using the patent, unless such prayer was comprehended in the general prayer for relief. The prayer was that the defendant be enjoined from violating the covenants which he had entered into to pay tariffs for the license to use certain patent-rights, and for an account. In that case it was attempted by the plaintiff's counsel to sustain the jurisdiction on the ground that the suit was brought under the patent act, and that the *gravamen* laid was the infringement of patent-rights. But that attempt failed.

The case of *Brooks v. Stolley*, 3 McL., 523, decided in 1845, was a bill in favor of the licensor of a patent-right against a licensee. The ground of complaint was that the licensee had violated the covenants which he had entered into upon the granting of the license, the keeping of which covenants, it was claimed, was a condition to the grant. There was a prayer for an injunction against using the machine licensed, and a conditional one was granted. An exception was taken that, as both parties were citizens of the same state, the court had no jurisdiction. But the jurisdiction was sustained, on the ground that the subject-matter of the bill gave jurisdiction.

If there be any doubt on the cases above referred to, as to the weight of authority upon the question now under consideration, all such doubt is removed after an examination of the case of *Wilson v. Sandford*, 10 How., 99 (APPEALS, § 602). That case was subsequent to the cases in 1 Blatchford and 3 McLean. The bill in the case in 10 Howard was for an injunction, and appears to have been, in substance, very like the bill in the present case. It was brought by a licensor of a patent-right against a licensee. The license was given upon the payment of \$1,400, to wit, \$200 in cash, and the remainder in notes; and the complaint was that the notes had not been paid. There was a provision in the license that, if the notes, or any of them, were not paid at maturity, then all the rights granted by the license should revert to the

licensor, who should be reinvested in the same manner as if the license had not been made. The notes were not paid. The licenses in the present case contain provisions that the licensees shall pay certain tariffs, and keep correct accounts, and permit their books to be inspected at all reasonable hours; and the complaint is that the defendants have not paid the tariffs, and have not kept true accounts, and have not permitted their books to be examined. There is no express provision in their licenses that, if they do not keep their covenants, the rights granted by the licenses shall revert to the licensor. The court, in the case in 10 Howard, say: "The dispute in this case does not arise under any act of congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

In the case of *Hartshorn v. Day*, 19 How., 211 (CONTRACTS, §§ 1585–88), the court, in commenting on the effect upon a license of the non-performance, by the licensee of a patent-right, of covenants made by him, say: "The payment of the annuity" (covenanted to be paid) "was not a condition to the vesting of the interest in the patent in Judson, and, of course, the omission or refusal to pay did not give to Chaffee" (the patentee) "a right to rescind the contract, nor have the effect to remit him to his interest as patentee." "The remedy for the breach could rest only upon the personal obligation" of the covenantor. The weight of authority, therefore, in the federal courts is clearly that this court has no jurisdiction of the case now under consideration.

The decisions of state courts sustain these views. The jurisdiction of the circuit courts in cases arising under the patent laws, without regard to the citizenship of the parties or the amount in controversy, is exclusive. Curtis on Patents, sec. 496. State courts have no jurisdiction to entertain a suit, either in law or equity, where the *gravamen* laid is the infringement of patent-rights. *Dudley v. Mayhew*, 3 Comst., 9. But in the case of *Rich v. Atwater*, 16 Conn., 409, which was a bill to enforce, by injunction, the rights of the plaintiff under a special agreement made upon a license given to the defendant to use the patented invention, it was held that the court had jurisdiction; that such a suit was not a suit which, by the patent law, belonged to the federal courts; and that the *gravamen* was the breach of a contract. The *gravamen* in this case is the breach of a contract. Without such breach there would be no pretense of the violation of any of the plaintiffs' rights. Jurisdiction is not given to the circuit court by the patent act of all suits where patent-rights are the subject of inquiry. An action for fraud in the sale of a patent-right is cognizable by the state courts. Cognizance of such an action is not given to the circuit court by the patent act. *Peck v. Bacon*, 18 Conn., 377.

With this view of this question, the motion must be denied for want of jurisdiction.

DUWELL v. BOHMER.

(Circuit Court for Ohio: 2 Flippin, 168–176. 1878.)

STATEMENT OF FACTS.—Bill to restrain the infringement of a trade-mark, alleged to have been registered in accordance with the act of congress of July 8, 1870.

Opinion by SWING, J.

The demurrer is that this court has no jurisdiction of the case.

§ 1541. *The United States circuit court has jurisdiction in equity to restrain infringement of trade-marks duly registered, without reference to the citizenship of the parties.*

The ground of the demurrer is that the parties are both residents of the state of Ohio, and that there is no act which confers upon the United States courts jurisdiction of the subject-matter in such a case. The act of 1870 (R. S., sec. 629, p. 111) gives the circuit court jurisdiction of all suits under the copyright and patent laws. If the trade-mark law is in any fair sense a copyright law, the act gives jurisdiction. The only provision of the constitution which in any wise bears on the power of congress to pass laws respecting trade-marks, or to protect them, is the following, viz.: Section 8 of article 1 of the constitution of the United States. "The congress shall have power, to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writing and discoveries." "Also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

There is no other clause of the constitution which vests in congress the power to grant to authors an exclusive right to their writings, and congress in legislating on this question undoubtedly drew their power from this section. The copyright and trade-mark laws all come from the same source. So if the trade-mark act of 1870 be a copyright law, then the court has jurisdiction without reference to residence or the amount in controversy. The clause or words in section 4942 of the copyright and trade-mark law, viz.: "Shall be liable to an action on the case for damages for such wrongful use of such trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use," does not limit this jurisdiction.

But there may be a general extending of the right to sue; that is, where there is a general jurisdiction in the courts of the United States you may go into any state court. This section 4942 may be an enlargement, but is not a limitation, of the jurisdiction. But aside from this act, section 1, chapter 137, of the act of March 3, 1875, provides: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States," etc. The clause granting jurisdiction is without limitation as to residence. It only limits the amount in controversy. The remaining clauses are wholly disjunctive.

The first three clauses are without qualification as to citizenship. Then follows the clause when there shall be controversies of citizens of different states. In the present case the right is derived exclusively from a law of the United States. In this statute no citizenship is requisite, and if, in this case, it is a suit of a civil nature at common law or in equity, the jurisdiction vests in the circuit court, whenever the amount in controversy is over \$500. If the suit arises under the constitution or a law of the United States, the jurisdiction is then vested without respect to the amount.

The authorities upon the question at issue are very limited, and not a single case, in which the question has been raised, has been cited by counsel. The point at issue is argued for the first time *de novo*. It has been ably argued.

I have looked into every book and in all reported decisions, and have been unable to find anything in which the question has been determined.

In Bump's Treatise, Law of Patents, Trade-marks and Copyrights, it seems to be taken for granted that the circuit court has jurisdiction. I find that in the index, under the head of circuit courts, is "Original jurisdiction in patent cases, page 13," "in copyright cases 13," "in trade-mark cases 13," "without regard to citizenship, page 13." And he has classed it there without regard to citizenship. Turn to the pages referred to in the index, and we find a copy of the trade-mark act. Turn to page 349 — where he speaks of the jurisdiction — he simply copies section 4942 of the act.

When we go back to his index and look under the head of "Trade-marks," we find "Remedy in State Courts Preserved." See page 250, on which page he quotes section 4945 of the statute of 1870 (R. S., ch. 2). Now, if we examine that section, we find that it provides again: "Nothing in this chapter shall prevent, lessen, impeach or avoid any remedy at law or in equity, which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this chapter had not been enacted." So it is clear that he regards the jurisdiction which the circuit court has additional to that possessed by the state courts, and that the circuit court has jurisdiction without reference to the residence of the parties or the amount in controversy. When we come to look at the trade-mark law (R. S., title 60, page 953), we find that the title thereof is "Patents, Trade-marks and Copyrights." And then follows: "Chapter One, Patents;" "Chapter Two, Trade-marks;" "Chapter Three, Copyrights;" and the sections are numbered continuously from the beginning of chapter 1, through chapters 2 and 3. The demurrer is overruled.

§ 1542. **Injunction against infringement.**—The circuit court has jurisdiction to issue an injunction to restrain the infringement of letters patent at the suit of a foreign administrator of the original patentee. *Smith v. Mercer*,* 5 Penn. L. J., 533.

§ 1543. **Enjoining representation of scene in play.**—Under the act of August 18, 1856, this court has authority to enjoin the representation or sale of a certain scene in a play which is a substantial reproduction of a material scene in the plaintiff's play. *Daly v. Palmer*, 6 Blatch., 256.

§ 1544. **Enjoining use of machine in another state.**—In a suit in New York to restrain the unlawful use of a patented machine in Vermont, the court held that the proceedings for the purpose of restraining such use being instituted against the owner or party concerned in the infringement, it was sufficient if the court had jurisdiction of the person of the defendant. *Wilson v. Sherman*, 1 Blatch., 536.

§ 1545. **Injunction under act of 1800.**—Under the act of 1800, and previous to that of February 15, 1819, the only remedy given by congress to a patentee whose rights were infringed was an action at law to recover threefold damages; a suit in equity for an injunction would not lie in the circuit court between citizens of the same state. *Livingston v. Van Ingen*,* 1 Paine, 45.

§ 1546. *Quære*: Whether such an action would lie as ancillary to and in defense of an action at law. *Ibid*.

§ 1547. **Relief independent of injunction.**—The seventeenth section of the patent act of July 4, 1836 (5 U. S. Stats. at Large, 124), confers jurisdiction in equity upon the circuit courts, irrespective of the right of the patentee to an injunction or his demand for one. Hence this court has jurisdiction of a bill in equity against infringers praying for a discovery and account, although the period of the patentee's grant has expired, and he is no longer entitled to an injunction. *Nevins v. Johnson*, 3 Blatch., 80.

§ 1548. **Proceeding against machine itself.**—It seems that when it is necessary to proceed against the machine itself, as in extreme cases of contumacy, or fraudulent contrivance to evade an injunction, the proceedings must be in the district where the machine is located. *Wilson v. Sherman*, 1 Blatch., 536.

§ 1549. **Specific performance.**—A suit for the specific performance of a contract for the sale of a patent-right is not a suit arising under the patent laws, within the jurisdiction of the circuit courts. *Burr v. Gregory*,* 2 Paine, 426; *Brooks v. Stolley*, 3 McL., 523.

§ 1550. A bill seeking to subject a patent-right to a judgment in favor of complainant is not a case arising under the patent laws. *Ryan v. Lee*,* 10 Fed. R., 917.

§ 1551. Residence of parties.—In patent causes the jurisdiction of the federal courts is not dependent on the residence of the parties, except that the defendant must reside or be found in the district in which suit is brought. *Blunt v. Allen*,* 8 N. Y. Leg. Obs., 107; *Brooks v. Stolley*, 3 McL., 523.

§ 1552. The jurisdiction of the circuit court of the United States in patent cases extends to cases where all the parties are citizens of the same state. *Evans v. Eaton*, 3 Wheat., 518.

§ 1553. The circuit court of the United States has jurisdiction of a suit in equity brought by the assignee of a patent, against the patentee, to restrain infringement, although all the parties are citizens of the same state. *Littlefield v. Perry*, 21 Wall., 218.

§ 1554. Service.—All suits arising under patent-rights are within the jurisdiction of the circuit court of the United States, but the suit must be brought in the circuit court for that district where the defendant resides, or is served personally with process; and this fact of personal service within the district of the court should appear plainly on the record. *Allen v. Blunt*, 1 Blatch., 483.

§ 1555. Prior suit at law unnecessary.—The United States circuit court has jurisdiction in equity of cases for infringement of patents, without previously sending the parties to try the patent at law. Ordering a law trial is discretionary with the court and does not affect its jurisdiction. The supreme court of the District of Columbia has the same powers. *Cochrane v. Deener*, 4 Otto, 782.

§ 1556. The circuit courts of the United States have jurisdiction of controversies arising under the patent laws by direct grant from congress. They do not act merely as ancillary to courts of law, and, therefore, do not require the patentee to establish his legal right in a court of law and by the verdict of a jury. *Sanders v. Logan*,* 2 Pittsb. R., 244.

§ 1557. Declaring patent void — Rights arising exclusively under license.—On a bill in equity by licensees to have the defendants enjoined from commencing any suit on the license or alienating the license pending this action; to have the patents declared void for want of novelty; and the license canceled and the tariffs paid by the plaintiffs returned, *held*, that this court had no jurisdiction of a suit to declare a patent void, except under the sixteenth section of the act of July 4, 1836 (5 U. S. Stat. at L., 123), and the tenth section of the act of March 3, 1859 (*id.*, 354), in the cases therein specially provided, under none of which this suit came. And that this court did not have jurisdiction of this suit by virtue of section 17, act of July 4, 1836, because the rights of the defendant, by virtue of the license, arose out of the license, and not, in any proper or legal sense, out of or under the patents or the law under which they were granted. *Merserole v. Union Paper Collar Co.*, 6 Blatch., 356.

§ 1558. Construction of contract between author and publisher.—The United States circuit court has no jurisdiction of a case involving solely the construction of a contract between author and publisher, and not in any way touching the validity of a copyright. *Pulte v. Derby*, 5 McL., 336.

§ 1559. Contract not raising any question under the patent laws.—Whenever a contract is made in relation to patent-rights which is not provided for and regulated by an act of congress, the parties, if any dispute arises, stand upon the same grounds as other litigants in respect to the jurisdiction of the court. Hence when the matter in dispute was whether the complainant in a bill in equity was entitled to an extra half cent for the use of his patents under a license, express or implied; and it appeared that the decision did not depend in any way upon the construction of any law of congress relating to patents, and it also appeared that the parties were citizens of the same state, the court held that it did not have jurisdiction of the suit. *Blanchard v. Sprague*, 1 Cliff., 288.

§ 1560. After sale of patented article.—The right of property to a patented machine after it has been sold by the maker to another is not protected by the laws of the United States, but by the state laws, and it is to them the owner must look if he wishes his rights to be protected. *Bloomer v. McQuewan*, 14 How., 550.

§ 1561. Remedy after expiration.—A bill in equity for the infringement of a patent will not lie after the patent has expired, if it asks only for damages for the infringement, for the remedy is complete at law; but if it asks for a discovery, and such an account as is the proper subject of a suit in equity, the circuit court will take jurisdiction. *Vaughan v. East Tenn., Virg. & Ga. R. Co.*, 1 Flip., 621.

§ 1562. Assignees of inventors.—Although inventors only are named in the act of 1836, section 17, giving jurisdiction to the circuit courts in patent cases, no doubt can be entertained that the act extends to and includes the assignees of such inventors. *Jenkins v. Greenwald*, 1 Bond, 126.

§ 1563. Assignment of right to sue for infringement.—The profits recoverable in an action for the violation of an exclusive right under a patent are not regarded in the light of

§§ 1564-1573. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

unliquidated damages, and an assignment which transfers to the complainant the right to sue for infringements of the patent is not void. *Ibid.*

§ 1564. **Extension procured by fraud.**—So long as an act extending a patent exists in the statute book, this court will regard it as the law of the land, and as governing, so far as it applies, the rights of the parties, although it may have been obtained by fraud and misrepresentation. *Gibson v. Gifford*, 1 Blatch., 529.

§ 1565. **Unpublished play written by non-resident alien and purchased by resident alien.**—The acts of congress in regard to copyright do not extend to the case of an unpublished play, written by a non-resident alien, and purchased by a resident alien. The parties to the suit, however, being proper parties to bring the case within the jurisdiction of the court, the court retained jurisdiction of a bill to enjoin the representation of the play, by virtue of their general equity jurisdiction. *Keene v. Wheatley*,* 9 Am. L. Reg., 44.

5. *Internal Revenue.*

SUMMARY — *Jurisdiction lost by act of 1866*, § 1566.—*Remedy against collector*, §§ 1567, 1569.—*Remedy against assessor*, § 1568.—*Jurisdiction in removed suits*, § 1570.—*No jurisdiction to enjoin collection of illegal tax*, § 1571.—*Jurisdiction under act of 1833 to enjoin collection of illegal tax*, § 1572.

§ 1566. Under the statute of 1864, the circuit courts had original jurisdiction of internal revenue suits between citizens of the same state; but the repeal of that statute in 1866 took away this jurisdiction, and cases pending under it at the time of the repeal, fell. *Insurance Co. v. Ritchie*, §§ 1573-74.

§ 1567. An action of *assumpsit* may be maintained against a collector to recover taxes illegally assessed and paid under due protest. *Assessor v. Osbornes*, §§ 1575-80.

§ 1568. *Semble*, that an assessor, though perhaps liable in some cases for an illegal assessment, is not liable in *assumpsit* for taxes paid the collector. *Ibid.*

§ 1569. Under the acts of 1833 and 1864, a suit might be maintained in the circuit court between citizens of the same state to recover internal revenue duties illegally assessed, but this right is taken away even in suits then pending by the act of July 30, 1866. *Ibid.*

§ 1570. Although the circuit court is without original jurisdiction of these suits, it could take cognizance of them if removed by defendants from a state court. *Ibid.*

§ 1571. The circuit court has no power to enjoin the collection of an illegal income tax, either under the constitution defining the judicial power of the United States, because this provision has not been put in force by legislation, or under the general equity powers of the court. *Roback v. Taylor*, §§ 1581-84.

§ 1572. Under the act of March 2, 1833, the circuit court has power to enjoin the collection of an illegal tax. *Georgia v. Atkins*, §§ 1585-86.

[NOTES.—See §§ 1587-1589.]

INSURANCE COMPANY *v.* RITCHIE.

(5 Wallace, 541-545. 1866.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—We meet upon the threshold of this cause a question of jurisdiction. The record discloses a suit in equity by the Merchants' Insurance Company, a corporation under the laws of Massachusetts having its place of business in the city of Boston, against James Ritchie and E. L. Pierce, assessor and collector of internal revenue in the third collection district of that commonwealth. The corporation constructively (*Louisville R. Co. v. Letson*, 2 How., 554 (§§ 1346-50, *supra*); *Marshall v. Baltimore & Ohio R. Co.*, 16 id., 314 (CONTRACTS, §§ 555-62), and *Ritchie and Pierce* actually, are citizens of Massachusetts. And the question is, Whether this suit, as a revenue case, can be maintained by a citizen of Massachusetts against citizens of the same state?

§ 1573. *The statutes relating to revenue suits.*

The judiciary act of 1789 limited the jurisdiction of national courts, so far as determined by citizenship, to "suits between a citizen of the state in which

the suit is brought and a citizen of another state." And except in relation to revenue cases this limitation has remained unchanged. In 1833 an attempted nullification of the laws for the collection of duties on imports led to the enactment of a law, one of the provisions of which conferred on the circuit courts jurisdiction of "all cases in law or equity arising under the revenue laws of the United States for which other provisions had not been already made." 4 Stat. at Large, 632. Until the passage of this act no original action by a citizen of any state against a citizen of the same state could be maintained in a national court at law or in equity, for injuries arising from the illegal exaction of duties by collectors of revenue. Redress of such injuries could be obtained only in the state courts, and the revisory jurisdiction of this court could be invoked only under the twenty-fifth section of the judiciary act.

The act of 1833 made the right of action to depend not altogether, as previously, upon the character of the parties as citizens or aliens, but also on the nature of the controversy, without regard to citizenship or alienage. Under that act citizens of the same state might sue each other for causes arising under the revenue laws. A citizen injured by the proceedings of a collector might have an action against him for the injury, though a citizen of the same state with himself. And the third section of the same act gave the right to collectors or others who might be sued in any state court, on account of any act done under the revenue laws, to remove the action by a proper proceeding into a national court. The right to remove causes from state into national courts had been long before given by the judiciary act, but it was limited to certain classes of cases, which did not include those arising under the laws for the collection of duties.

After the act of 1833 many suits, brought in the state courts against collectors, were removed into the circuit courts. The cases of *Elliott v. Swartwout*, 10 Pet., 137, and *Bend v. Hoyt*, 13 id., 267, were of this description. They were suits originally instituted in the superior court of New York, but removed to the circuit court of the United States for the southern district, to recover from collectors of the port of New York duties alleged to have been illegally exacted. Under that act suits in equity in proper cases, as well as actions at law, might have been maintained against collectors of customs by citizens of the same state; and upon the enactment, under the exigencies created by civil war, of the existing internal revenue laws, it became a question whether the general provisions of that act, giving jurisdiction of cases under the revenue laws, extended to cases under the new enactments. This question was resolved by the internal revenue act of 1864, in the fiftieth section of which it was provided that the provisions of the act of 1833 should extend to all cases arising under the laws for the collection of internal duties. 13 Stat. at Large, 241.

§ 1574. *The statute of 1864, in force when this suit was brought, would give jurisdiction, but the repeal of that statute in 1866 takes it away.*

It was while this section of the act of 1864 was in force that the suit in the present record was brought. Had it been suffered to remain in force the question of jurisdiction now under consideration could not have arisen. But it was repealed by the act of 1866 (14 Stat. at Large, 172), without any saving of such causes as that before us. And not only was there no such saving, but it was expressly provided that "the act of 1833 shall not be so construed as to apply to cases" arising under the act of 1864, or any amendatory acts, "nor to any case in which the validity or interpretation of such act or acts shall be in

issue.” The case before us is a case under the act of 1864. It is a case of which, because of the fact that the appellants and appellees are citizens of the same state, we have no jurisdiction except under the act of 1833. And the act of 1866 declares that the act of 1833 shall not be construed so as to apply to such a case.

This is equivalent to a repeal of an act giving jurisdiction of a pending suit. It is an express prohibition of the exercise of the jurisdiction conferred by the act of 1833 in cases arising under the internal revenue laws. It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. *Rex v. Justices of London*, 3 Burr., 1456; *Norris v. Crocker*, 13 How., 429. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

It is quite possible that this effect of the act of 1866 was not contemplated by congress. The jurisdiction given by the act of 1833 in cases arising under the customs revenue laws is not taken away or affected by it. In these cases suits may still be maintained against collectors by citizens of the same state. It is certainly difficult to perceive a reason for discrimination between such suits and suits under the internal revenue laws; but when terms are unambiguous we may not speculate on probabilities of intention. The rules of interpretation settled and established in the construction of statutes deny to us jurisdiction of the controversy in the record, because it is a suit between citizens of the same state, and the jurisdiction of such suits in internal revenue cases, conferred by the acts of 1833 and 1864, is taken away by the act of 1866. The appeal in this cause must therefore be dismissed for want of jurisdiction.

THE ASSESSOR *v.* OSBORNES.

(9 Wallace, 567-575. 1869.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Damages are sought to be recovered by the plaintiffs of the defendant, as the assessor of internal revenue taxes for the twenty-fourth district of the state of New York, because, as they allege, he illegally assessed against them certain internal revenue taxes upon certain articles which they manufactured during the period specified in the declaration.

They brought their suit on the 20th of July, 1866, and the declaration contains forty-one counts. Twenty-eight of the counts relate to certain internal revenue taxes alleged to have been illegally assessed by the defendant against the plaintiffs upon certain iron castings of two classes therein described. One class consisted of castings of iron exceeding ten pounds in weight for each casting, and the other class consisted of castings of iron of ten pounds weight for each casting, or less, as more fully set forth in the first fourteen counts. Machines, in a finished condition, for reaping and mowing, were also manufactured by the plaintiffs during the same period, and the remaining thirteen counts relate to assessments made by the defendant against the plaintiffs upon reaping and mowing machines which were in a finished condition; and the charge is, that the last-named assessments were also illegal, and that the defendant, as such assessor, transmitted the lists to the collector of the district, and that the plaintiffs paid the taxes under protest, as in the case of the assessments upon

the castings of iron, which were, in fact, used as component parts of the finished machines.

For several years prior to the assessment of the taxes in question the plaintiffs had been manufacturers of the Kirby Harvester and Mower, at Auburn, within that collection district. They were the exclusive licensees for the manufacture and sale of those machines under the several patents granted for that invention, and the agreed statement shows that they make the castings used as parts of the machines as well as the machines in their organized and finished condition, and it is admitted that the castings which they make cannot be used for any other purpose than as component parts of their machine, nor as parts of any different machine made by any other manufacturers.

Castings manufactured by the plaintiffs are made from pig-iron, upon which the internal revenue duties imposed under the acts of congress have been fully paid. All of the castings, after being taken from the moulds, require to be polished, examined and tested, to see if they are perfect and fit for the purpose before they can be used as component parts of a reaper or mower, and many of them have also to be painted and varnished. Reapers and mowers, when sold by the plaintiffs, include as parts thereof all the necessary pieces of castings and of wood-work to constitute a complete working machine; but they do not put all of the several parts together until the purchaser is ready to use the machine in the field, as it is much more convenient to transport the several parts in their separate condition than the embodied machine.

Prior to the year 1865 the plaintiffs had never made any returns to the assessor or assistant assessor of any castings which they manufactured, nor had they ever been required to make any such return, either by the assessor, assistant assessor or commissioner; but the commissioner, in March of that year, directed the defendant, as such assessor, to require of the plaintiff such a return, specifying the number of tons of such castings which they had manufactured of the two classes mentioned in the declaration, for the six months next preceding the month of March of that year, and also the number of finished machines which they had manufactured and sold during the same time, in order that the same might be separately taxed, as follows: (1) That the castings of ten pounds weight or less each casting might be taxed at the rate of five per cent. *ad valorem*. (2) That the castings exceeding ten pounds in weight each casting might be taxed at the rate of \$3 per ton. (3) That the finished machines sold during that time might be taxed five per cent. *ad valorem*, without any deduction being made for the castings used as component parts of the machines.

Pursuant to the directions of the commissioner the plaintiffs made the required return and paid the taxes to the collector, under protest, and brought this suit to recover compensation for the illegal acts of the defendant. Process having been served, the defendant appeared and pleaded that he was not guilty, which was duly joined by the plaintiffs, and the parties entered into stipulation waiving a jury, and consenting that the cause might be tried by the court without the intervention of a jury. 13 Stat. at Large, 5. Hearing was accordingly had before the court and judgment was rendered for the plaintiffs in the sum of \$9,805.12, besides costs and charges. Whereupon the defendant sued out a writ of error and removed the cause into this court. Besides the first assessment, which included the month of July, 1864, and extended to February, 1865, both inclusive, there were subsequent assessments for each month following up to and including May, 1866, and the agreed state-

ment finds that the same state of facts apply to every month thereafter until the passage of the act of the 13th of July, 1866, which transferred reapers and mowers to the free list. 14 Stat. at Large, 149.

§ 1575. *Method of recovering taxes illegally assessed and paid under protest.*

Where internal revenue taxes are illegally assessed it is well settled that the injured party, if he complies with the conditions specified in the act of congress upon that subject, and pays the taxes under protest, may maintain an action of *assumpsit* against the collector to recover back the amount so paid. *Philadelphia v. The Collector*, 5 Wall., 731. Collectors in such cases are not required to reimburse themselves for such liabilities, but the provision is that all such judgments against them shall be paid by the commissioner, including the costs and expenses of the suit. Such a judgment against the collector is in the nature of a recovery against the United States, and, consequently, the amount recovered is regarded as a proper charge against the revenue collected from that source. Grant all that, and still the concession does not touch the question involved in this case, as the suit in the case before the court is against the assessor to recover back taxes paid to the collector, which presents a question never adjudicated in this court. Assessors may, perhaps, be liable for an illegal assessment in cases where they have no jurisdiction to make any assessment, but the question whether an assessor is liable to an action of *assumpsit* for taxes paid to a collector is a very different question, and it is quite certain that such a theory finds no support in any prior decision of this court. *Barhyte v. Shepherd*, 35 N. Y., 238; *Weaver v. Devendorf*, 3 Denio, 117; *Swift v. Poughkeepsie*, 37 N. Y., 511; *Dickinson v. Billings*, 4 Gray, 42; *Railroad v. Charlestown*, 8 Allen, 245.

Actions of the kind may, under some circumstances, undoubtedly be maintained against the collector, and it may be that an assessor, acting in a case where he has no jurisdiction, may be liable to the injured party for an illegal assessment of internal revenue taxes, but neither the collector nor the assessor can be sued in the circuit court of the United States by any party who is a citizen of the same state with such collector or assessor. Suits in such cases, that is, where the plaintiff and defendant are citizens of the same state, may be brought in the state courts, but such suits cannot be maintained in the circuit courts under existing laws unless the plaintiff and defendant are citizens of different states. Consequently, where the parties are citizens of the same state, the action must be brought in the state court, but the defendant, if he sees fit, and seasonably takes the proper steps, may remove the cause into the circuit court for trial.

§ 1576. *Under the acts of 1833 and 1866 suit might be maintained in the circuit court, for the recovery of internal revenue duties illegally assessed, between citizens of the same state, but this right is taken away by the act of 1866.*

Cases arising under the revenue laws were declared to be cognizable in the circuit courts by the act of the 2d of March, 1833, unless where it appeared that other provisions for the trial of the same had been previously made by law. Laws for the assessment and collection of internal revenue duties were not in existence at that time, but those provisions were extended by the fiftieth section of the act of the 30th of June, 1864, to cases arising under the acts of congress providing for the collection of internal revenue duties, and the same section provides that all persons authorized to assess, receive or collect such duties or taxes under those laws shall be entitled to all exemptions, immunities, benefits, rights and privileges therein enumerated or conferred. 13 Stat. at

Large, 241. Such an action, to recover back internal revenue duties, illegally assessed and paid under protest, might undoubtedly have been maintained in the circuit courts while that provision remained in force, although both parties were citizens of the same state, as the jurisdiction was made to depend upon the subject-matter; but the first proviso in the sixty-seventh section of the act of the 30th of July, 1866, expressly enacts that the original act, to wit, the act of the 2d of March, 1833, shall not be so construed as to apply to cases "arising under any of the internal revenue acts, nor to any case in which the validity or interpretation of those acts shall be in issue." 14 Stat. at Large, 172; *Philadelphia v. The Collector*, 5 Wall., 728; *Insurance Co. v. Ritchie*, id., 541 (§§ 1573-74, *supra*).

Unquestionably the effect of that proviso was to confine the original act to the purposes for which it was passed, and to limit its scope and operation, standing alone and unaffected by the fiftieth section of the subsequent act, to cases arising under the acts of congress providing for the collection of import duties. But that proviso left the fiftieth section of the act of the 30th of June, 1864, untouched and in full force, and if legislation had stopped there, persons duly authorized to assess, receive or collect internal revenue duties would still have been entitled to the same exemptions, immunities, benefits, rights and privileges under the original act as persons employed to assess, receive or collect import duties. Legislation, however, did not stop there, but the sixty-eighth section of the act of the 13th of July, 1866, repealed the fiftieth section of the act of the 30th of June, 1864, altogether, subject to the proviso contained in the same repealing section, which enacts that any case removed from a state court into the circuit court, under the former regulations upon the subject, shall be remanded, unless the justice of the circuit court shall be of the opinion that the same, if pending in the state court, might be removed into the circuit court under the new provision contained in the sixty-seventh section of that act.

Since the passage of that act and the repeal of the fiftieth section of the prior act, the circuit courts have no jurisdiction of cases arising under the internal revenue laws to recover back duties illegally assessed and paid under protest, unless the plaintiff and defendant therein are citizens of different states. Such actions must be commenced in the state courts if the parties are citizens of the same state, but the defendant may, at any time before the trial, upon petition to the circuit court of the district in which he is served with process, remove the cause, upon due proceedings therein, into such circuit court, and the provision is that the cause thereafter shall be heard and determined as a cause originally commenced in that court. 14 Stat. at Large, 171, § 67.

§ 1577. *The circuit court, though without original jurisdiction in such a suit as this, yet could maintain it if removed from a state court by defendant.*

Assumpsit for money had and received is the appropriate remedy to recover back moneys paid under protest for internal revenue duties illegally assessed; and, if commenced in a state court, the action may be removed, on petition of the defendant, into the circuit court for the district where the service was made, and in that state of the case the jurisdiction of the circuit court is clear beyond doubt, irrespective of the citizenship of the parties; but if the action is originally commenced in the circuit court, the cause must be dismissed for the want of jurisdiction, unless it appears that the parties were citizens of different states.

Three propositions are submitted by the plaintiffs as being severally sufficient to take the case before the court out of the operation of that rule: (1) They

contend that it does not appear that the case was not removed from the state court into the circuit court, as required to give the circuit court jurisdiction under existing laws. (2) That it does not appear that the plaintiff and defendant in the case are not citizens of different states, as required to confer jurisdiction upon the circuit court. (3) That the case was properly cognizable in the circuit court at the time it was commenced, and that the subsequent repeal of the provision conferring such jurisdiction does not impair the right of the plaintiffs to maintain the suit.

Unsupported in fact as the first proposition is, it does not seem to be necessary to enter into any argument to refute it. Suffice it to say that the record shows that the suit was commenced in the circuit court, and that it was not removed into that court from the state court, which is all that need be said in reply to the first proposition.

§ 1578. *Where the jurisdiction of the federal courts depends upon citizenship, such citizenship must be alleged.*

When the jurisdiction of the circuit court depends upon the citizenship of the parties, it is not enough that it does appear that they are not citizens of the same state, but the facts necessary to give the circuit court jurisdiction must be distinctly alleged. Circuit courts are courts of special jurisdiction, and therefore they cannot take jurisdiction of any case, either civil or criminal, where they are not authorized to do so by an act of congress. *Sheldon v. Sill*, 8 How., 449 (§§ 1194-95, *supra*); *Turner v. The Bank*, 4 Dall., 10 (§ 1098, *supra*); *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. United States*, 12 Pet., 616.

§ 1579. *Jurisdiction depending upon a statute falls with the repeal of the statute.*

Jurisdiction in such cases was conferred by an act of congress, and when that act of congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of congress. *Norris v. Crocker*, 13 How., 438; *Yeaton v. United States*, 5 Cranch, 281 (APPEALS, §§ 2756-57); *The Rachel*, 6 id., 329; *The Irresistible*, 7 Wheat., 551; *Maryland v. Railroad Co.*, 3 How., 534; 1 Kent (11th ed.), 465; *Butler v. Palmer*, 1 Hill, 324.

§ 1580. *Where the court below gave judgment in a case of which it had no jurisdiction, judgment will be reversed and the cause remanded with directions to dismiss for want of jurisdiction.*

Applying these principles to the present case it is clear that the circuit court had no jurisdiction of this case. Usually where a court has no jurisdiction of the case the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has improperly given judgment for the plaintiff. In such a case the judgment in the court below must be reversed, else the plaintiff would have the benefit of a judgment rendered by a court which had no authority to hear and determine the matter in controversy.

Judgment reversed, and the cause remanded with directions to dismiss the case for the want of jurisdiction.

ROBACK v. TAYLOR.

(Circuit Court for Ohio: 2 Bond, 36-41. 1866.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is a bill in equity, in which the complainant, Charles W. Roback, a citizen of the state of Ohio, avers, in substance, that for ten years prior to the autumn of 1865, he had been largely and successfully engaged in the manufacture and sale of medicines in the city of Cincinnati; that in the prosecution of that business he had devoted much time and attention and invested some \$60,000 of capital; that in the fall of 1865 he retired from it, and sold the good will of the same for \$55,000; that after such sale, the assessor for the district under the internal revenue act of the United States charged and returned the proceeds of said sale as part of the complainant's income for the year 1865; and that the defendant, R. M. W. Taylor, collector of internal revenue for the second collection district of Ohio, to whom the return of the assessor was made, threatens, and is about to proceed to collect a tax of \$5,500 by distraint. The bill then avers that the return and assessment of said sum as income tax is unjust and contrary to law; and prays that the said collector and all others may be perpetually enjoined from the collection thereof, and that, upon final hearing, the same may be decreed to be illegal and void.

On the 5th of August last, Mr. Justice Swayne granted an injunction, to continue "until further hearing at the next term of the court." It may be proper to here state that the learned judge, in making the order for an injunction, intimated a strong doubt as to the jurisdiction of the court on the case made in the bill, but thought it due the complainant to restrain further proceedings for enforcing the collection of the alleged illegal tax until the case could be more fully heard. A motion is now made by the district attorney of the United States, in behalf of the present incumbent of the office of collector for the second collection district, to dissolve the injunction, on the ground of a want of jurisdiction in this court to entertain the case. This motion necessarily precludes all inquiry as to the legality of the tax assessed against the complainant. If the court has no jurisdiction, whatever may be its conviction upon the question of the legality of the tax, it has no power to grant the relief prayed for in the bill; and the injunction must necessarily be dissolved.

§ 1581. *This court has no jurisdiction of a bill filed to restrain the collection of an illegal income tax.*

The question thus presented is important in its character, but in my judgment not difficult of solution. It arises under a statute of recent enactment, and upon the points for decision the court has not the aid of any prior judicial action. They must be decided, therefore, in the light of general and well-settled principles, and not upon the authority of precedents having a direct application to the case. I shall be very brief in stating the grounds on which I have attained the conclusion that the court has no jurisdiction to grant the relief prayed for. It will readily be conceded that jurisdiction cannot be sustained from the citizenship of the parties. From the averment of the bill it appears that both the complainant and the defendant are citizens of Ohio. It is not, therefore, a case of controversy, in the words of the constitution, "between citizens of different states."

§ 1582. *The provisions of the constitution as to the judicial power of the United States are not self-executing, and require legislation to put them in force.*

It is insisted, however, that the jurisdiction vests by force of that clause of the second section of the third article of the constitution which declares that

“the judicial power shall extend to all cases in law or equity arising under this constitution, *the laws of the United States*, and treaties made or which shall be made under their authority.” The argument is that as this case arises under and involves a construction of a law of the United States, the clause just quoted vests jurisdiction in the courts without reference to the citizenship of the parties. There is, in my judgment, a conclusive argument against the tenability of this position. No case has been referred to, and it is believed there is no one, in which it has been sustained by the supreme court or any of the courts of the United States. The clause of the constitution relied on as conferring jurisdiction in cases arising under the laws of the United States does not import a self-executing power. It belongs clearly to that class of powers, of which there are many in the constitution, which are dormant and inoperative until vitality and vigor are imparted to them by the action of the legislative department of the government. I will not stop to designate those provisions of the constitution to which this principle applies.

Now it may be conceded that, in the case before the court, the question whether, from the facts set forth in the bill, the income tax assessed and charged against the complainant is legal or illegal, depends upon the construction to be given to a clause in an internal revenue statute enacted by congress, and may be said properly to arise under a law of the United States. But we look in vain for any statutory provision declaring what court shall have jurisdiction, or how jurisdiction shall be exercised, in a case of an alleged grievance or injury arising from the error or malfeasance of any of the officials charged with the execution of the acts of congress for the assessment and collection of internal revenue. Until congress shall designate the court in which jurisdiction shall vest, and shall declare in what manner it shall be exercised, the constitutional provision cited cannot be operative. There are two courts of the United States inferior to the supreme court, namely, the circuit court and district court, created by the legislation of congress, and possessing only such powers and jurisdiction as shall be meted out and defined by law. Now, it may be pertinently asked, which of the two courts named, in the absence of any legislative provision on the subject, shall entertain the jurisdiction invoked in this case, and by what form of proceeding shall the redress sought for be obtained? This uncertainty must be fatal to the exercise of jurisdiction by either of those courts, unless it can be based on some other foundation than that claimed in the argument of counsel.

§ 1583. *The remedy for illegal assessment of income tax.*

There can be no question that it is within the constitutional competency of congress to vest the jurisdiction either in the circuit or district court, of hearing and deciding all cases of alleged illegal and wrongful acts arising from the execution of the internal revenue laws. But, for reasons which they doubtless deemed sufficient, they have carefully avoided the investiture of such jurisdiction in either of said courts. From the structure of the laws referred to, the implication is exceedingly strong that their framers did not intend there should be any interference by the judicial department which, in its operation, should obstruct or embarrass their prompt execution. This conclusion is irresistible from a reference to these laws. Congress, however, has not left those aggrieved by the wrongs or mistakes of revenue officials without the means of obtaining redress. But it is the plain policy of the law that the remedy is not to be by a resort to courts, but to other means pointed out by law. I will not stop to point out all the provisions of the statutes which justify this conclusion. By

section 113 of the act of June 30, 1864, in force when the alleged illegal income tax was assessed against the complainant, it is made the duty of the proper assistant assessor to assess and make returns of all incomes subject to taxation. Of this assessment public notice is to be given; and it is provided "that every person feeling aggrieved by the decision of the assistant assessor in such cases may appeal to the assessor of the district, and his decision thereon shall be final." The right of appeal thus granted seems, in the opinion of the law-making power, to have been ample for the security of the tax payer against the errors and wrongs of the assistant assessor. But this is not the only provision by which such errors or wrongs may be finally remedied. Although it is expressly declared that the decision of the district assessor shall be final, an appeal lies to another and higher official. By section 44 of the act it is provided "that the commissioner of internal revenue, subject to the regulations prescribed by the secretary of the treasury, shall be, and he is hereby, authorized, on appeals to him made, to remit, refund and pay back all duties erroneously or illegally assessed or collected, and all duties that shall appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected," etc. The power thus vested in the commissioner of revenue is to be exercised under the supervision of the secretary of the treasury, to whom, practically, there is an appeal from the commissioner. And I need hardly add, if the rights of the party aggrieved are not secured by these means, as a final resort there is an appeal to congress, whose power to afford redress is unquestionable.

The provisions of the statute referred to seem clearly to sustain the proposition that it was intended by congress that wrongs and grievances occurring under the internal revenue act should be investigated and passed upon, not by the courts, but by the officials immediately charged with their execution. And it is not for this court to pronounce upon the justice or policy thus sanctioned by the law-making power. The internal revenue laws originated in a great national emergency, and were necessarily so framed as to insure their prompt execution. That they are harsh in some of their provisions, and may develop in their execution cases of official malfeasance and oppression, is not doubted. The remedy for such results is with the legislative, and not the judicial, department, unless the power is expressly conferred on the latter. The courts of the United States are courts of limited jurisdiction, and can exercise such powers only as are expressly granted by law, or clearly implied from the objects of their creation.

§ 1584. *Quære: Whether the circuit court has jurisdiction by reason of its chancery powers to enjoin the collection of an illegal income tax.*

It may perhaps be insisted, though it was not urged in the argument, that if the jurisdiction claimed in this case does not exist under the clause of the constitution quoted, it may be exercised by the circuit courts under the general chancery powers vested in them by the constitution and laws. These courts undoubtedly possess an extensive jurisdiction under this head. Without considering at length the source and extent of this jurisdiction, it may be affirmed as a clear proposition that the case made in the complainant's bill is not one that brings it within the scope of the general chancery power of this court. There is no averment in the bill that the complainant will suffer irreparable injury from the collection of the alleged illegal income tax. Nor is it averred that he was without a remedy by law. As a basis for the proper action of a court of chancery, it must appear that he has appealed to the proper district

assessor, under the section of the statute before cited; that such appeal has not resulted in the redress of the wrong complained of; and that he is wholly without a remedy, except by the interposition of a court of chancery. I do not say, if the bill had been so framed, a proper case for the action of a court of chancery would be presented. But it is clear that without the averment of irreparable injury, and that all the means of redress secured by law had been unavailingly resorted to, there would be no sufficient ground for the interposition of a court of equity.

The court has no jurisdiction, and the injunction must be dissolved.

GEORGIA *v.* ATKINS.

(Circuit Court for Georgia: 1 Abbott, 22-27. 1866.)

Opinion by ERSKINE, J.

STATEMENT OF FACTS.—This is a bill in equity filed in this court by the state of Georgia against James Atkins, the defendant, collector of the fourth collection district of this state, under the internal revenue law of the United States, praying that a writ of injunction may be granted to restrain the defendant from further proceeding in the collection of the sum of \$6,004.56, claimed to be due to the United States, under section 103 of that law, from the Western Atlantic Railroad. The bill alleges that this railroad is the property of the state of Georgia exclusively; that the entire net income of this railroad forms a part of the revenue of the state, and is applied to the support of its government; and that the superintendent is the mere agent of the state, and has no authority over the road or its income which is not specifically given to him by the act of the state. The following portion of the bill, showing its general scope and object, may be cited at length: “And your orator further complains, and says, heretofore, on the 10th day of May, 1866, the said James Atkins, collector of the internal revenue of the United States, as aforesaid, gave notice to Campbell Wallace, the superintendent of said railroad, that he, the said superintendent, should pay to him, the said collector, the sum of six thousand and four dollars and fifty-six cents (\$6,004.56), the said sum being demanded as revenue tax of the United States on \$640,082.49, gross earnings of said road for five months and two days, to the 28th day of February, 1866; and that should he, the said superintendent, fail to make said payment by the 20th day of May following, that he, the said collector, would issue and have levied upon said railroad and its property a distress warrant for said amount, with ten per cent. added thereto.” The defendant has demurred to the whole bill. This admits all the facts in the bill that are well pleaded.

From the view which I take of this suit, it will not be necessary to pass upon more than two of the questions discussed. The first matter for inquiry is that of jurisdiction. The district court of the United States for the northern district of Georgia has, by the act of congress approved August 11, 1848 (9 Stat. at Large, 280), annexed to it the powers of a circuit court. The circuit courts of the United States are courts of special and limited jurisdiction, deriving all their powers from the constitution and the acts of congress.

§ 1585. *Under the act of March 2, 1833, the circuit court has power to enjoin the collection of an illegal tax.*

I will briefly endeavor to ascertain whether this court has jurisdiction of the parties. In the case of *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How., 518, it was asserted in explicit language by Mr. Justice McLean,

who delivered the opinion, and also by Mr. Chief Justice Taney, in his dissenting opinion, that the suit might have been instituted in the circuit for the western district of Pennsylvania, instead of originally presenting it to the supreme court. And as to the controversy: the first part of section 2 of the act of March 2, 1833, provides "that the jurisdiction of the circuit courts of the United States shall extend to all cases in law and equity, arising under the revenue laws of the United States, for which other provisions are not already made by law." It will be observed that the jurisdiction here conferred by congress does not depend upon the amount in dispute, nor the citizenship of the parties.

The case of *Cutting v. Gilbert*, assessor, and *Shook*, collector, of the thirty-second collection district of the city of New York, was a suit in equity, instituted by the complainants in the circuit court of the United States for the southern district of New York, for themselves, as well as all others in interest who might come in, etc., against the defendants, to enjoin the assessment and collection of a tax claimed by those officers to be due to the United States under section 99 of the national internal revenue law, for bonds, stocks, etc., bought and sold by claimants, as licensed brokers and bankers. Because, among other things, of the joinder of improper parties, the injunction was denied by the court, and the parties left to their remedy at law. But Mr. Justice Nelson, in delivering the opinion, said: "The second section of the act of congress of March 2, 1833, known as the Force Act, confers jurisdiction in express terms, and which has been applied to this act by its fiftieth section. And jurisdiction had previously, and has since, been upheld and exercised upon general principles of equity jurisprudence." 9 Wheat., 739, 903 (CONST., §§ 2363-87); 16 How., 369 (CONST., §§ 2246-53); 18 id., 331 (CORP., §§ 565-73); 1 Black, 436; Pamphlet, containing argument of Mr. Courtney, United States district attorney, in behalf of the defendants, and the decision of Judge Nelson, p. 27, New York, 1865. The preceding extract is a direct authority on the question under immediate consideration, and, for myself, I entertain no doubt whatever of the jurisdiction or power of this court, if the tax sought to be collected is illegal, unwarranted by the act of congress, to interpose by writ of injunction and arrest the threatened invasion of the property of the complainant.

§ 1586. *Under an act imposing a tax upon every "person, firm, company or corporation" owning a railroad, a state is not taxable though sole owner of a railroad.*

One other question only need be the subject of examination, and that is whether, under the internal revenue laws, it was the intention of congress that a duty or tax should be collected out of the property owned, controlled and managed solely by a state; for it is admitted in the pleadings that the Western & Atlantic Railroad is the property of the state of Georgia exclusively, and that the net income arising from the road is revenue applied to the support of the government of the state. Section 103 of the act of congress of June 30, 1864 (13 Stat. at L., 275), as amended by that of March 3, 1865 (14 id., 135), declares "that every person, firm, company or corporation, owning or possessing or having the care and management of any railroad, canal, steamboat, ship," etc., engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States," . . . "shall be subject to and pay a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship," etc. The question, narrowed to a point, is this: Does the word or term "corporation," for the

purposes of this act and as herein used, include the term "state?" The United States is formed of a number of states or commonwealths united together, and these constitute one general government. The state of Georgia is an integral and indissoluble part of the United States, but it is, nevertheless, in the meaning of the public law, a state. When the term "corporation" is applied to a nation or a state, it is employed in its most extensive signification, and thus used, the United States or commonwealths composing the Union may be termed "corporations." But when the term "corporation" is directed or refers to those artificial persons, bodies corporate or politic, instituted for the promotion or advancement of religion, learning or commerce, and for various other objects, public or private, where charity, industry, skill and speculation can be freely and advantageously employed, and which owe their existence, name, powers and duration to a government, it is used in its ordinary, and, to the common understanding, explicit sense.

Is the former or the latter application of the term the fair and legitimate one intended by the act? Now in order to arrive at the intention of the law-giver the whole and every part of the statute should be considered in determining the meaning of any of its parts; taking the words to be understood in that sense in which they are generally used by those for whom the law was intended, and discarding all subtle and strained construction for the purpose of limiting or extending their operation or import. In the case of *Martin v. Hunter*, 1 Wheat., 326 (APPEALS, §§ 682-729), Mr. Justice Story, in delivering the opinion of the court, said that "words are to be taken in the natural and obvious sense, and not in a sense unreasonably restricted or enlarged." And in *Denn v. Reid*, 10 Pet., 524, it was remarked by Mr. Justice McLean, in pronouncing the decision of the court, that "cases may be found where courts have construed a statute most liberally to effectuate the remedy; but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature." I am of the opinion that congress intended the term "corporation," as used in this act, to be understood in its general, obvious and natural meaning; and therefore it does not include the term "state." And so far as my limited researches go, I am unable to discover a single case in the supreme court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term "corporation" — body corporate or politic — when used in a statute, includes a "state," or where the one term is used as a synonym for the other.

It is therefore ordered that the demurrer be overruled; and that the writ of injunction issue in accordance with the prayer of the complainant, upon giving bond in the sum of \$30,000. Order accordingly.

§ 1587. Removal to federal court.— Cases arising under the internal revenue laws, if commenced in a state court, against an officer appointed or acting under those laws, or against persons acting under such an officer, may be removed on petition of the defendant into the circuit court for the district, and such court has undoubted jurisdiction of the case. *Philadelphia v. The Collector*, 5 Wall., 720.

§ 1588. Original jurisdiction.— The circuit court of the United States has no original jurisdiction of an action of *assumpsit* for revenue taxes illegally collected by the collector. The action should be brought against the collector in the state court, and may be removed into the federal court by him. *Williams v. Reynolds*,* 17 Int. Rev. Rec., 103.

§ 1589. Restraining collection of tax.— It is doubtful if a suit could be maintained in the circuit court to restrain the collection of internal revenue taxes even under the act of March 2, 1833, extending the jurisdiction of that court to all cases arising under the revenue laws,

and under the act of June 30, 1864, extending this provision to cases under the laws for the collection of internal revenue. If, however, there was such power, it was taken away by the repeal of the latter act in 1866, and under the act of March 2, 1867, no suit to restrain the collection of a tax may be maintained in any court. *Hornthall v. Collector*,* 9 Wall., 560; *Mason v. Rollins*,* 13 Wall., 602.

6. Suits to Recover Offices.

SUMMARY — *Office lost by violence*, § 1590. — *Jurisdiction given by act of 1870*, § 1591. — *No power to give ancillary relief*, § 1592. — *Powers of state courts*, § 1593.

§ 1590. The circuit court has no jurisdiction, under the enforcement act of May 31, 1870, of a suit to reinstate complainant in an office which he had held for some time, but from which he has been ejected by violence, even though the petition alleges that, at the time of his election, persons were denied the right to vote by reason of race, color and previous condition of servitude. He has not been deprived of an election within the meaning of the statute. *Johnson v. Jumel*, §§ 1594-95.

§ 1591. Under the "enforcement act" of May 31, 1870, the jurisdiction given the circuit court in cases touching the title to an office extends only to cases where the right to vote is denied on account of race, color or previous condition of servitude. *Harrison v. Hadley*, §§ 1596-1603.

§ 1592. Where the court has no jurisdiction of the subject-matter, it can give no ancillary or auxiliary relief. *Ibid.*

§ 1593. When no jurisdiction is given the federal courts in cases of rights claimed under the constitution, the state courts are open to give relief, and the decision may be reviewed by the supreme court. *Ibid.*

JOHNSON v. JUMEL.

(Circuit Court for Louisiana: 3 Woods, 69-75. 1877.)

STATEMENT OF FACTS.—Plaintiff filed a petition in which he set forth that he had been duly elected auditor of public accounts in 1876, and commissioned by Governor Kellogg, who was acting as governor, and held the office until the 25th April, 1877, when he was ejected by defendant, who claimed to be auditor, commissioned by Nicholls, who claimed to be governor of Louisiana. The petition charged fraud against Nicholls and Jumel, in that large numbers of legal voters who would have voted for petitioner were excluded on account of race, color, etc. The petitioner prayed for a restoration to his office, and an injunction, etc. The defendant demurred to the petition.

Opinion by BILLINGS, J.

The substance of the petition is that the petitioner was a candidate for the office of auditor of public accounts of the state of Louisiana, at the election held on the 7th of November, 1876; that voters in various parishes who were entitled to vote were denied the right to vote at said election on account of race, color or previous condition of servitude, to the number of ten thousand; that the officers known as the returning board were by law vested with complete jurisdiction to correct the errors and wrongs which had then arisen in these various parishes, and that they did make such corrections and returned the petitioner elected to said office; that he was duly commissioned and entered upon and enjoyed the possession of said office for the period of four months, when he was forcibly ejected by a government established by domestic violence, insurrection and revolution; that the claim or pretense upon which they have ousted him from his office is that the petitioner was not elected, and that the votes which were cast in the parishes in which the right to vote was denied should be counted against him.

§ 1594. *The circuit court has no jurisdiction under the enforcement act of May 31, 1870, of a suit to reinstate complainant in an office from which he has been ejected by violence.*

According to the allegations of this petition, petitioner has not been defeated or deprived of any election; but, on the contrary, was elected and was declared elected by the competent state authority, was duly commissioned, and retained his office for the period of four months. True, there had been an unsuccessful attempt to defeat petitioner by an exclusion of votes in the various parishes, but he avers that that attempt had been completely thwarted by the tribunal which had the final revision of the returns. Every vote that was cast or was attempted to be cast for the petitioner and against the defendant had, according to his allegations, full effect given to it, and was finally and effectively counted by the board of returning officers. He has thus, so far from having been defeated, succeeded in an election, and instead of having been deprived of an election, has secured an election, and four months after the election has been deprived, not of an election, but of an office, to which he had been elected and authoritatively declared elected; and he has been deprived of an office, not by the exclusion of votes for any reason, but by force, which took the proportions of a revolution. The statute under which jurisdiction is given to the circuit court is set forth in the act of May 31, 1870, sec. 23 (16 Stat., 146; R. S., sec. 2010), as follows: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in congress, or member of a state legislature, by reason of the denial to any citizen or citizens, who shall offer to vote, of the right to vote, on account of race, color or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial, and such person may bring any appropriate suit or proceeding to recover possession of such office; and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides."

§ 1595. *Scope of the enforcement act.*

From this it appears that the cases in which the circuit courts have jurisdiction of such actions as this are limited to those in which it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offered to vote, on account of race, color or previous condition of servitude, and that the jurisdiction of the circuit court is only given to the extent of determining the rights of the parties to such office, by reason of the denial of the right guaranteed by the fifteenth article of amendment to the constitution of the United States.

There is no doubt that the scope of this statute, under the limitations which it contains, extends from the first act required to be done in the matter of an election down to and including the final and effective canvass of the votes by the officers who are charged with the duty of determining and certifying the result. If, in any of the stages of an election, in registration, in the receipt of votes, the certificates of the votes by the local authorities, or the final canvass of the votes, or the certificate of election by the returning board, there had been such a denial of the right to vote as the statute contemplates, on account of race, color or previous condition of servitude, that matter this court would have had,

under the act of congress, jurisdiction to inquire into and adjudicate upon, and it could determine the rights of the parties to office, so far as they depended upon the denial of the right guarantied by the fifteenth article of the amendment to the constitution. But the jurisdiction of the court begins and ends with the denial of the right to vote.

If, therefore, there is a preliminary exclusion, or an exclusion at the polls, and that error is corrected by the proper state authorities, and there is no final and effective exclusion of votes or discrimination, or if, after an election has been held and the result reached and declared without discrimination or exclusion from any cause, the person elected is deprived of his office, then the statute closes the doorway upon the jurisdiction of this court. The defeat of a candidate at an election, or his deprivation of an election, must be accomplished by the machinery of the election, in one of its stages, and must be contained in the result. If the election terminates in the success of the candidate, the essential ground of jurisdiction on the part of this court is wanting. The wrong which the petitioner sets forth is, that, after being elected and installed, he has not been retained in the office. The object of the statute was to secure an election free from all possible exclusion on any of the specific grounds. It secured this object by giving to this court jurisdiction to correct, through this form of action, such exclusion effected by the machinery or practices attending the election. When, as the petitioner alleges, all this has been accomplished, and the very result aimed at by the statute has been worked out and declared, the statute gives no jurisdiction over a cause merely to enable a party to physically retain or regain an office to which he had a title established by an election, and from which he has subsequently been ejected. In this case the question by virtue of which the court could take jurisdiction, and by the terms of the statute it must be unmixed with any other question, is not presented. According to the allegations of the petition, the election had been completed for four months when the ouster took place, and his loss of office is as independent of any denial of the right to vote as if he had been ejected by a government set up by a foreign invasion, claiming authority by the right of conquest.

Let the demurrer be sustained and the petition dismissed.

HARRISON *v.* HADLEY.

(Circuit Court for Arkansas: 2 Dillon, 229-242. 1873.)

STATEMENT OF FACTS.—Bill filed by a defeated candidate for the office of judge of the supreme court of Arkansas. It was alleged that complainant and one Bearden were elected, and that they were fraudulently “counted out” by Hadley and Johnson, governor and secretary of state of the state of Arkansas, and that Searle and Stephenson were declared elected. The bill prays that these last named persons be enjoined from exercising the functions of judges of the supreme court of the state, and that the governor and secretary of state be required to deposit in court all the documents, records and papers relative to the election, and for general and special relief. There was an answer upon oath from each of the defendants, denying the frauds charged, and incorporated in the answer is a demurrer to the bill, which was heard by the court.

Opinion by CALDWELL, D. J.

Has the circuit court of the United States jurisdiction of the case made by

the bill? This question does not relate to the form of the action merely, but the demurrer challenges the jurisdiction of the court to make any adjudication in any form of action upon the facts stated in the bill.

It is not to be disguised that this is in effect a proceeding to contest in a United States court the title to a state office. And if this court has jurisdiction of this case, on the facts stated in the bill, then it has jurisdiction in all cases of contested elections, and that jurisdiction can be invoked to try every case involving a dispute as to which of two persons has been elected to any office, from the lowest township officer to the chief magistrate of the state. If such unqualified jurisdiction in this class of cases has been conferred, the court will not hesitate to assume and exercise it, however laborious and delicate it may be; but if it has not been expressly conferred by act of congress, it cannot be assumed. On a question of jurisdiction the court has no discretion; if the suitor brings his case within the jurisdiction of the court, he must be heard; and if his case is not within the jurisdiction of the court, he cannot be heard, no matter what the merits of his cause may be. The question in the case before the court is not whether, under the recent amendments to the constitution, congress might not confer, without any qualification or limitation, jurisdiction on the circuit courts of the United States to determine a controversy between two citizens of the same state, involving the title to a state office, but the question is, Have they done so? Although congress may possess the power under one, or all, of the recent amendments to the constitution of the United States to confer this jurisdiction on the courts of the United States, yet, if they have not done so, this court cannot exercise it.

§ 1596. *Circuit courts of the United States can exercise no jurisdiction not expressly conferred by act of congress.*

It is an error to suppose that the courts of the United States have original jurisdiction to enforce or protect every right or privilege secured or guaranteed to the citizen by the constitution of the United States, and acts of congress passed under its authority. For, although the constitution of the United States declares that "the judicial power shall extend to all cases in law and equity arising under this constitution and the laws of the United States," it was early decided that this provision of the constitution did not itself vest in the circuit or district courts of the United States any jurisdiction whatever, but that those courts could exercise jurisdiction only in cases in which it had been expressly conferred by congress. Confessedly, the grant of the judicial power to the United States authorizes congress to confer on the courts of the United States a much broader original jurisdiction than they have done. But the principle is now established that the circuit court of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must also be an act of congress expressly conferring the jurisdiction. The circuit court is a court of limited jurisdiction, and the supreme court has said that "the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction, unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears." *Turner v. Bank of North America*, 4 Dall., 8 (§ 1098, *supra*); *United States v. Hudson*, 7 Cranch, 32; *McIntire v. Wood*, 7 Cranch, 506; *Hubbard v. Northern R. Co.*, 3 Blatch., 84; *Ex parte Cabrera*, 1 Wash., 232; *Sheldon v. Sill*, 8 How., 441 (§§ 1194-95, *supra*); *Karrahoo v. Adams*, 1 Dill., 344, 348.

§ 1597. *Where the federal courts are not given jurisdiction in cases of rights claimed under the constitution, the state courts are open to give relief, and the supreme court may review the decision.*

It does not result that because congress has not vested in the courts of the United States original jurisdiction in cases where rights and benefits are claimed under the constitution of the United States, and acts of congress passed under its authority, that a citizen loses these rights and benefits. The state courts are open to him, and in such a case the rule of decision in the state courts is precisely the same that it would be in a court of the United States. In the case at bar, for instance, whatever rights or benefits the complainant may be entitled to under the constitution and laws of the United States, must be adjudged to him in the state courts. This rule is imperative, and is found in the words of the constitution, which declare: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

If it is suggested that the state courts might misinterpret the constitution and laws of the United States, and a suitor in those courts might thus be deprived of the rights and privileges claimed under the constitution and laws of the United States, there is a ready and satisfactory answer. Congress has wisely provided for such a contingency by declaring that in all such cases the judgment of the state court "may be re-examined and reversed or affirmed in the supreme court of the United States." Judiciary Act, sec. 25.

And by far the larger number of cases involving rights claimed under the constitution and laws of the United States are only drawn within the control of the federal courts upon appeal or writ of error after final judgment in the state courts. *Martin v. Hunter*, 1 Wheat., 304 (APPEALS, §§ 682-729); *Story on the Constitution*, sec. 1702; *Sargeant's Constitutional Law*, 276, 277; *The Moses Taylor*, 4 Wall., 411-430. And a right of action given by an act of congress "does not imply a right to sue in the courts of the United States unless it is expressed." *Bank of the United States v. Deveaux*, 5 Cranch, 61-86 (§§ 1344-45, *supra*). Keeping these rules in view, let us inquire whether this court has jurisdiction of the case made by this bill.

§ 1598. *Provisions and meaning of the civil rights bill and the enforcement act.*

The jurisdiction is sought to be maintained under the acts of congress passed to enforce the provisions of the recent articles (XIII, XIV, XV) of amendment to the constitution of the United States, and known as the "civil rights bill," approved April 9, 1866 (14 U. S. Stats., 27), and the "enforcement act," approved May 31, 1870 (16 U. S. Stats., 140), and the amendments thereto, approved February 28, 1871 (16 U. S. Stats., 433). It is plain the "civil rights bill" does not confer jurisdiction on this court of the case made by the complainant's bill. It may be conceded that the terms of that act are broad enough to embrace all persons, without regard to their descent or color, but it is not pretended that the complainant in this case does not enjoy the "full and equal benefit of all laws and proceedings for the security of person or property" enjoyed by any other citizen; nor is it claimed that he is "denied, or cannot enforce in the courts or judicial tribunals of the state, any of the rights secured to him" by that act.

The fifteenth article of amendment to the constitution of the United States declares: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude. The congress shall have power to enforce this article by appropriate legislation." Congress has legislated under this article, and that legislation is found in the enforcement act. The first section of that act provides: "That all citizens of the United States who are, or shall be, otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude." Succeeding sections of the act make ample provision for securing and protecting citizens otherwise qualified to vote from the deprivation of that right on account of their "race, color or previous condition of servitude." This is done by giving to the injured party a right of civil action for damages, and punishing the guilty party criminally, and in all such cases jurisdiction is expressly conferred on the United States courts.

The twenty-third section of the act is the only one conferring jurisdiction on this court in cases of contested elections, and that section is in these words: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in congress, or member of a state legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office; and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offer to vote, on account of race, color or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrent with the state courts, jurisdiction thereof so far as to determine the rights of the parties to such office, by reason of the denial of the right guaranteed by the fifteenth article of amendment to the constitution of the United States, and secured by this act."

§ 1599. *Extent of jurisdiction granted in cases touching the title to an office.*

This section bears upon its face evidence that it was drawn with unusual care and precision. By its terms, the jurisdiction of this court in cases touching the title to an office is expressly limited to "*cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color or previous condition of servitude.*" The language of this section is definite and precise, and is decisive of this case. Counsel who drew the bill in the argument frankly admitted complainant was unable to bring his case within the requirements of this section. It is clear from the bill itself that the alleged frauds were perpetrated without reference to the "race, color or previous condition of servitude" of the voters or candidates, and, if perpetrated, were prompted by no other or different motive than that which ordinarily impels men to commit such crimes.

There is no other section of this or any other act of congress from which the

jurisdiction in such cases can be deduced. Congress has not attempted to confer the jurisdiction except upon the single ground specified in this section, and it is therefore needless to inquire whether, under the constitution, they might extend the jurisdiction to all or any other cases of this nature. Of the constitutionality of the act in question I entertain no doubt.

§ 1600. *Case cited and distinguished.*

In the argument reference was made to the case of *Kellogg v. Warmouth and others*, pending in the United States circuit court for the district of Louisiana. The bill in that case is drawn with special reference to this twenty-third section, and all the necessary averments made to bring the case literally within its terms. The bill in that case charges expressly that the qualified voters who offered to vote, and whose votes were rejected, "were refused the right to vote on account of their race, color and previous condition of servitude." And these averments are repeated in reference to every fraudulent and illegal act charged in the bill, and are assigned and relied on as the sole ground for all the relief sought and prayed for by the bill. And from the unofficial report of that case it appears that the leading counsel for the complainant (Mr. Beckwith) rested the jurisdiction on the twenty-third section of the act, and these averments in the bill, and the court grounded, as indeed it must have done, its judgment on the question of jurisdiction on this section and these allegations in the bill. Saying nothing of the form of the proceeding and the particular relief sought and granted in that case, it is clear that the facts stated in the bill brought the case exactly and literally under the twenty-third section. This the counsel for the complainant in the argument broadly conceded had not been done in this case, because the complainant could not conscientiously make the averments required by that section to confer jurisdiction.

§ 1601. *History of the enforcement act.*

In support of the jurisdiction, one of the counsel for complainant, in the argument, read from speeches made by senators in congress while the enforcement act was pending before that body. An examination of the official report of the proceedings of congress discloses the fact that the particular section of the bill to which those speeches related was afterwards stricken out and is not now found in the act. Indeed, if anything was wanting to show that congress never designed to confer on the courts of the United States jurisdiction in this class of cases, beyond the single case covered by the twenty-third section, it would be found in the legislative history of this measure. See Cong. Globe, 2d session, 41st Congress, p. 3561, where the principle of giving jurisdiction to United States courts in this class of cases is first broached in section 5 of the bill there set out. It was much discussed by senators, and finally, with the consent of the chairman of the committee having charge of the bill, it was stricken out. *Id.*, pp. 3570, 3654. Subsequently it was renewed by Senator Carpenter, in an amendment proposed by him (*id.*, p. 3680), and his proposition, after a modification making it in legal effect what the twenty-third section now is, was adopted by the senate (*id.*, p. 3680), and passed that body. *Id.*, p. 3690.

The house not concurring in the amendments made by the senate, the bill went to a committee of conference, where the principle of conferring on the courts of the United States jurisdiction in contested elections in any case was specially considered, and the twenty-third section, as it now stands, was the result of that consideration, as is shown by the report of the committee to each house. The chairman of the committee of conference on the part of the sen-

ate, in reporting the action of the committee to the senate, referred particularly to the twenty-third section, and said: "The committee of conference have redrawn the section [23] very carefully, narrowing it down to the particular issue where the right to vote is denied for that specific reason (race, color or previous condition of servitude), not drawing anything else before the United States courts, and for the purpose of giving effect to this fifteenth amendment." *Id.*, p. 3753.

The chairman of the committee of conference on the part of the house, in reporting the action of the committee to the house, after quoting the twenty-third section as it now stands in the statute, said: "I should have preferred, because I do not deem it essential to the success of this measure, that the senate had not raised this question with the house of contesting any election in the [United States] courts; but having raised it, I am content to enact the provision with the limitation now put on it (into a law), and leave it thus forevermore, assured as I am that it can work no possible harm, because in any event and in every event it leaves in the courts of the United States no power save to determine *the single question where the person offering his vote shall have it rejected simply on the ground that his right, guarantied under the fifteenth amendment to the constitution of the United States, is denied.* . . . I do not believe, under any possible condition of things, it would be necessary, as the constitution now stands, to vest in any of the courts of the United States any jurisdiction over the question of contested elections, beyond the express jurisdiction with the express limitation contained in the twenty-third section of the report." *Id.*, p. 3872.

It will be seen from these reports that the twenty-third section, in its present form, was the work of a conference committee that embraced among its members lawyers and jurists of eminence and national reputation, who were not likely to err in interpreting the work of their own hands.

Both houses of congress approved and assented to the views of the committee by adopting their report. The text of the act will admit of no other or different interpretation than that given it by this committee. It is not pretended that the opinions of individual legislators can be received to alter the text or control the interpretation of an act of congress; but where, as in this case, an act has been carefully considered and revised by a conference committee, their opinions carefully and deliberately expressed, when they accord with the plain text of the act, show very conclusively that congress was not mistaken as to the legal effect of the language of the act, and did not intend that it should receive an interpretation different from the one plainly expressed.

§ 1602. *As the court has no jurisdiction of the subject-matter, it can give no ancillary relief.*

It is suggested that although the court may not have jurisdiction of the principal subject-matter, it may yet have jurisdiction to grant the auxiliary and ancillary relief prayed for in the bill. In answer to this suggestion it is enough to say that there is no act of congress conferring jurisdiction to grant such auxiliary and ancillary relief, and the reasoning that excludes the jurisdiction of the court over the principal subject-matter of the suit applies with equal force to the ancillary and auxiliary relief sought.

§ 1603. *Supervisors appointed under act of congress, June 10, 1872, have no authority in state elections.*

The complainant is clearly mistaken in supposing the supervisors of election appointed in this state, under the act of congress approved June 10, 1872 (17 U. S.

Stats., pp. 348-9), have any authority to supervise or report upon the election of state officers. No return or report they might make in reference to the election of any state officer could have any official sanction, or be received as evidence in this or any other court.

The court having no jurisdiction of the case made by the bill to determine in any form of action the right of complainant to the office in dispute, it is needless to inquire whether a bill in chancery will lie in such case, or whether the remedy must be by *quo warranto*. And for the same reason it is unnecessary to inquire whether the court, supposing it to have jurisdiction, could grant the several injunctions and restraining orders prayed for in the bill.

§ 1604. *Jurisdiction in contested election cases.*

The complainant must, therefore, be remitted to the justice of his own state tribunals, where, from the foundation of the government down to the present time, the exclusive jurisdiction over cases of contested election for state offices has been vested and still remains, except where the case turns solely on the single fact specified in the twenty-third section.

The demurrer to the bill is well taken, and the injunctions and other extraordinary writs and relief prayed for are refused, with leave to complainant to have a re-argument upon the demurrer before a full bench at the next term.

Demurrer sustained.

7. *Service, Attachment and Voluntary Appearance.*

[As to Process, see WRITS.]

SUMMARY — *Privilege against suit, how waived, § 1605.— Exemption from suit out of district a mere privilege, § 1606.— No jurisdiction by foreign attachment, § 1607.— Jurisdiction only by service, § 1608.— Foreign corporation, § 1609.— Defendant may be served where found, § 1610.— Not found if inveigled by false representations, § 1611.— Not found if only visiting, § 1612.— Jurisdiction over person not acquired by proceeding in rem, § 1613.— No process beyond district, § 1614.— Admiralty courts limited like others, § 1615.— Power of congress to confer jurisdiction, § 1616.— Attachment suits under act of 1875, § 1617.*

§ 1605. When a defendant's exemption from suit is a personal privilege and not a jurisdictional fact, the privilege may be waived by a general appearance. *Page v. Chillicothe*, §§ 1618-20.

§ 1606. A provision of congress, that a defendant must be sued in that division of a district wherein he resides, confers upon such defendant only a privilege which may be waived. *Ibid.*

§ 1607. No process of foreign attachment will give the circuit court jurisdiction over a non-resident defendant who is not found and served within the district. *Saddler v. Hudson*, § 1621.

§ 1608. To give the circuit court jurisdiction, a defendant must be an inhabitant of the district or be found therein and must be served with process. *Day v. India Rubber Co.*, §§ 1622-25.

§ 1609. A foreign corporation is not found within a district, when its officers or its goods are found therein. *Ibid.*

§ 1610. When a defendant is found within the district in which plaintiff lives, he may be served with process there. *Union Sugar Refinery v. Mathiesson*, §§ 1626-28.

§ 1611. A party is not found within a district so that process may be served upon him, when he is inveigled into the district by false representations, or detained there by improper contrivance, or by illegal arrest. *Ibid.*

§ 1612. Jurisdiction is not obtained against a defendant by service made upon him while temporarily visiting within the district. *Smith v. Tuttle*, § 1629.

§ 1613. A libel was filed in a circuit court against a box of silk condemned as prize, which was within the jurisdiction of the court, and which was alleged to be in the possession of a stranger not a citizen of the district, and not served with process. The court rendered a money decree against this stranger. In a suit to enforce the decree in another district, *held*, that the former court, though having undoubted jurisdiction over the *res*, had no jurisdiction

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over the person of its possessor, unless he were an inhabitant of the district, or found therein and served with process. *Wilson v. Graham*, §§ 1630-33.

§ 1614. The federal courts, in the exercise of their common law and equity powers, cannot issue process beyond the limits of their respective districts. *Ex parte Graham*, §§ 1634-37.

§ 1615. The federal courts sitting in admiralty, though unlimited in their jurisdiction as to subject-matter, are limited in point of locality by the general principles of law, and by the provisions of the judiciary act. *Ibid.*

§ 1616. Congress has power to confer upon the federal courts jurisdiction in suits against non-residents. *United States v. Ottman*, §§ 1638-43.

§ 1617. The act of March 3, 1875, gives this jurisdiction by removal in attachment suits begun in a state court. *Ibid.*

[NOTES.—See §§ 1644-1662.]

PAGE *v.* CITY OF CHILLICOTHE.

(Circuit Court for Ohio: 6 Federal Reporter, 599-602. 1881.)

Opinion by SWING, D. J.

STATEMENT OF FACTS.—The bill in this cases alleges that complainants are owners of a certain patent in relation to improvements in induction-coil apparatus; that the defendant is infringing their said patent, and prays for an injunction and for damages. The bill was filed September 27, 1880, and on the same day a subpoena in chancery was issued to the marshal of said district, who returns that he served the same in Ross county, Ohio, by delivering a copy of it to the mayor and clerk of the city of Chillicothe. The subpoena required the defendant to appear by the first Monday in November. On the first Monday of November the defendant, by its attorneys, Banning & Davidson, entered its appearance in the cause. On the 4th day of December, on motion of defendant, leave was given to answer by the first Monday of February. On the 21st day of February, 1881, on motion of defendant, leave was given to answer in twenty days; and on the 18th day of March, 1881, the defendant filed its motion to dismiss, as follows: "Now comes the defendant, the city of Chillicothe, by its counsel, and moves the court to dismiss the bill herein filed, for want of jurisdiction, the defendant being a resident of the eastern division of the southern district of Ohio, and not found or served in the western division herein." On the 4th of February, 1880, an act was passed by congress dividing the southern district of Ohio into two divisions, to be known as the eastern and western divisions; Ross county, in which the city of Chillicothe, the defendant, is, being in the eastern division. This act provides that "all suits not of a local nature, in the circuit and district courts, against a single defendant, inhabitant of said state, must be brought in the division of the district where he resides."

§ 1618. *Where exemption from suit is a personal privilege, and not a jurisdictional fact, the privilege is waived by a general appearance.*

Under this provision, it is clear that this suit should have been brought in the eastern division, and not in this; and if the defendant had entered its appearance for the purpose only of moving to dismiss the suit, the motion would have been granted; but the appearance was the general appearance of the party. Not only so, but during the term at which the appearance was entered the defendant moved the court for, and obtained, further time in which to answer; and at the next succeeding term, upon its motion, it was granted further time in which to answer; and not until the expiration of this time was an exception to the jurisdiction taken. The subject-matter of the suit is one over which this court has jurisdiction, and if the defendant resided within this dis-

strict the residence of the parties would be such as to give the court jurisdiction. It is not a case where the parties must be residents of different districts in order to give the court jurisdiction, but both parties in patent suits may be residents of the district within which the suit is brought. Under the acts of congress conferring jurisdiction upon this court, the subject-matter and the citizenship of the parties, whether residing in this or the eastern division, would give this court jurisdiction of this cause if service had been made within this division. The provision in the act for the division of the district, that the suit should be brought in the division of the district in which the defendant resides, is not one creating the jurisdiction of this court, but is one for the personal convenience of the defendant.

§ 1619. *A defendant's exemption from suit, except in the district where he resides or is found, is a mere personal privilege.*

This case is clearly distinguishable from the cases referred to by the learned counsel for the defendant, which hold that consent cannot confer jurisdiction, and that objections to the jurisdiction may be taken at any stage of the case. In those cases either the subject-matter or the citizenship, which was essential to give jurisdiction, did not exist; but in this case the only question is as to the place where the jurisdiction shall be exercised. In *Gracie v. Palmer*, 8 Wheat., 699, the suit was brought in the state of Pennsylvania, and none of the defendants were citizens of that state, and Mr. Webster objected to the jurisdiction because it did not appear that the defendants were inhabitants of, or found in, the district in which suit was brought at the time of the service of the writ, as required by the eleventh section of the judiciary act of 1789. Chief Justice Marshall, in delivering the opinion of the court, stated "that the uniform construction under the clause of the act referred to had been, that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein; that it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance; that if process was returned by the marshal as served upon him within the district, it was sufficient; and that where the defendant voluntarily appeared in the court below without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter."

In *Ex parte Schollenberger*, 96 U. S., 369 (§§ 1356-58, *supra*), Chief Justice Waite says: "The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

§ 1620. *What a general appearance waives.*

These authorities show very clearly, I think, that the defendant might waive the right to have this suit brought in the eastern district, and that by entering its general appearance in the cause, and its several applications for further time in which to answer, I hold that it has waived its right, in this case, to except to the jurisdiction of the court; the motion will, therefore, be overruled.

SADDLER v. HUDSON.

(Circuit Court for Maine: 2 Curtis, 6, 7. 1854.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is a motion to dismiss an action at law for want of jurisdiction. It is an action on the case founded on letters patent. The defendants are described in the writ as “citizens of the United States, and transacting business in the city of Portland, within said district of Maine.” The marshal returns on the writ, that he has attached property of the defendants, and “I have summoned the within named defendants to appear at court, by giving to Stephen Berry, agent of said defendants, a summons in hand, the said defendants both residing out of the district of Maine.” The question is whether this court has jurisdiction over the defendants, who are not inhabitants of this district, nor found therein, and upon whom personal service of the process has not been made.

§ 1621. *A process of foreign attachment will not give the court jurisdiction over a defendant not an inhabitant of, and not found within, the district.*

This question was considered by the supreme court in the case of Toland v. Sprague, 12 Pet., 329. It was there held, by a majority of the judges, that a process of foreign attachment, by which the property of a defendant was attached, by virtue of the state laws adopted by the process acts of 1789 (1 Stat. at Large, 93) and 1792 (1 Stat. at Large, 275), could not give the circuit court jurisdiction over a person not an inhabitant, and not found within the district. There is no sound distinction between a direct attachment and a foreign attachment. The rule announced by the court in that case, and repeated in Levy v. Fitzpatrick, 15 Pet., 171 (APPEALS, §§ 319, 320), is that process of attachment against the property of a non-resident defendant cannot issue from a circuit court, except as part of, or together with, process to be served on his person; and that no judgment can be rendered against a non-resident defendant, who has not been personally served with process, unless he has entered an appearance. In Picquet v. Swan, 5 Mason, 35 (§§ 868–876, *supra*), Mr. Justice Story had previously held the same views, and this law has been followed since in numerous cases. The case of Allen v. Blunt, 1 Blatch., 480, affords a strong illustration of the strictness with which the rule has been applied. That also was a suit on letters patent. The case must be dismissed for want of jurisdiction.

DAY v. NEWARK INDIA-RUBBER MANUFACTURING COMPANY.

(Circuit Court for New York: 1 Blatchford, 628–634. 1850.)

STATEMENT OF FACTS.—Motion to quash a writ of foreign attachment and summons, by defendant, a corporation established by and located in New Jersey. Goods belonging to defendant were attached, and service was made upon the president in New York.

§ 1622. *The provisions as to service of process in suits in the federal courts apply to patent cases.*

Opinion by NELSON, J.

The seventeenth section of the patent act of July 4, 1836 (5 U. S. Stat. at Large, 124), provides that all actions arising under any law of the United States granting to inventors the exclusive right to their inventions shall be

originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court. The jurisdiction of the circuit courts embraces, therefore, all cases, both at law and in equity, arising under the patent laws for infringements of letters patent, without regard to the citizenship of the parties or the amount in controversy. But the eleventh section of the judiciary act of 1789 (1 U. S. Stat. at Large, 78), which provides for service of process in the commencement of suits in this court, is as applicable to this class of cases as to any other in which jurisdiction may exist. That provision is as follows: "But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. *And no civil suit shall be brought before either of the said courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.*"

§ 1623. *To give jurisdiction to the federal courts the defendant must be an inhabitant of the district, or be found and served with process therein. Authorities reviewed.*

In the case of *Toland v. Sprague*, 12 Pet., 300, which was the case of a foreign attachment issued by the circuit court of the United States for the eastern district of Pennsylvania, agreeably to the practice of the courts of that state, which had been adopted by the circuit court, it was held after a full examination: 1. That, by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2. That independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of congress adopting the state process adopt the forms and modes of service only, so far as the persons are rightfully within the reach of such process, and do not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to process *in personam*; and that, even where a person is amenable to process *in personam*, an attachment against his property cannot be issued, except as part of or together with process to be served upon his person.

In that case the plaintiff was a citizen of the state of Pennsylvania; and the defendant was a citizen of Massachusetts, but was and had been for many years a resident of Gibraltar. The attachment was levied on his goods found in the district of Pennsylvania. The defendant appeared and defended the suit, which gave the circuit court jurisdiction; otherwise it would have been denied. The same point had been previously ruled by Judge Story in the case of *Picquet v. Swan*, 5 Mason, 35 (§§ 868-876, *supra*), and in which it was also held that the judiciary act of 1789 does not contemplate compulsory process against any person in any district, unless he is an inhabitant of the district, or is found within it at the time of serving the writ. And in the case of *Richmond v. Dreyfous*, 1 Sumn., 131, it was held by the same learned judge that a foreign attachment cannot be maintained in the circuit court of the United States against the principal defendant, unless he is an inhabitant of the district where the suit is brought, or is found within it at the time of the service of the process; and that service upon trustees or garnishees within the district is not sufficient to found a judgment against the principal. That case arose in the district of Rhode Island, and the goods of the principal defendant, who was a citizen of and a resident in the state of Pennsylvania, were attached within the district,

according to the statute of the former state regulating proceedings in cases of foreign attachments. The proceedings were quashed for want of jurisdiction.

Upon the provisions of the eleventh section of the judiciary act above referred to, therefore, and the expositions given to it in the several cases in which it has come under the observation of the courts, it must be regarded as settled that, in order to give jurisdiction to the circuit courts of the United States, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this, whether the suit be commenced by writ, summons or attachment, or whatever may be the nature or character of the process used. No exception is found in the act of congress providing for the commencement of suits in these courts, nor in the judicial expositions given to it. And the simple question in this case, therefore, is whether or not the defendants, as a corporate body, or in their corporate existence, have been brought within either of the alternatives provided for in the act, so that the service of the process, as disclosed in the papers before us, can give to this court jurisdiction of the case. Are they inhabitants of this district, within the meaning of the act of congress, or were they found within it at the time of the service of the attachment and summons?

§ 1624. *Though the officers or the property of a foreign corporation are found within the district, the court does not thereby acquire jurisdiction.*

Assuming that it has been shown on the part of the plaintiff that the president of the corporation or any of its officers were inhabitants of or were found within this district at the time of the service, or that the goods attached were the property of the corporation and were found within it, the objection to the jurisdiction still exists; for the party against whom the suit is brought is the corporation created by the legislature of the state of New Jersey. This is the body charged with the infringement of the plaintiff's patent, and against whom the suit has been instituted; and it is this body that must be shown to be an inhabitant of the district or be found within it, in order to give the jurisdiction. Now, we think it is quite clear that a corporate body created by the law of a sister state can have no corporate existence beyond the limits of the territory within which the law creating it can operate; and that, when and where the law ceases to have any force and effect, this legal entity and mere creature of the law ceases to have any existence. If the law should be abrogated by the legislature creating it, it would cease to exist in the jurisdiction within which it was created, the law bringing it into existence and upholding it being no longer in force; and for the like reason, it can never have any legal being or existence extraterritorial, where the law creating it never had any operation or force.

We do not intend nor have we time, in the pressure of the business of a circuit, to go into an illustration of this general principle by a reference to the character, powers and faculties of these institutions, or to define the limits of the operation of the laws of the states, upon which their existence depends; but shall content ourselves by stating the general principle, and briefly referring to what was said by the chief justice in delivering the opinion of the court in the case of *The Bank of Augusta v. Earle*, 13 Pet., 588 (Corp., §§ 1123-35). Referring to the argument in that case on the part of the defendants, that a corporation, from the very nature of its being, could have no authority to contract out of the limits of the state within which it was created, as the laws of a state had no extraterritorial operation, he observed: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty

by which it was created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another."

The court held in that case that though the bank, as a corporation, must be regarded as an artificial being, existing only in the state in which it was created, yet it was as competent, within the scope of its powers, to make contracts in another sovereignty through its agents, as a natural person, if permitted by the laws of that government to exercise the faculties with which it was endowed. It is upon this principle, doubtless, that the defendants have established and are maintaining a depot for the sale of their manufactured articles in the city of New York, which is conducted by their agents and under their authority.

§ 1625. *Semble, that this court would have no jurisdiction over a foreign corporation even though service were made upon it in accordance with state laws.*

Without pursuing the examination of the case further, we are satisfied, for the reasons stated, that neither the levying of the writ of attachment upon the goods of the defendants in this district, nor the service of the summons upon their president within it, nor both together, have the effect to give jurisdiction to the court in this case against the defendants; and further, that according to the true construction of the eleventh section of the judiciary act of 1789, the court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the state practice, if adopted by it, would authorize the institution of such suits by the attachment of their goods found within the jurisdiction. We have not deemed it important, in the view we have taken of the case, to inquire whether or not this court has heretofore, by any of its rules, adopted the practice of the state courts in cases of foreign attachment; but will simply state our conclusion, which is, that it has not, and that upon this ground the proceeding by attachment would be irregular and should be set aside. As the ground first stated goes to the jurisdiction of the court, we have preferred placing our decision upon it, as it reaches beyond the question in respect to the nature and character of the process by which the suit was commenced.

We shall, therefore, direct that a rule be entered quashing the writ of attachment and the summons which have been unadvisedly issued in the case.

UNION SUGAR REFINERY v. MATHIESSON.

(Circuit Court for Massachusetts: 2 Clifford, 304-310. 1864.)

STATEMENT OF FACTS.—Motion to set aside service of summons on defendant on the ground that he had been inveigled by false pretenses into the district for the purpose of serving process upon him.

§ 1626. *When a defendant is "found" in the district in which the plaintiff lives he may be served with process.*

Opinion by CLIFFORD, J.

Under the provisions of the eleventh section of the judiciary act (1 Stat. at Large, 79), it is clearly the right of the plaintiff to serve the defendant with process in the district where the plaintiff resides, provided the process be in

proper form, and the defendant be found in that district within the true intent and meaning of that provision. The argument of the defendant admits the proposition as stated, and it is so obvious that it is correct that the statement of it furnishes all the explanation that is required in its support. Withdraw that right from the plaintiff, and the consequence would immediately follow that a defendant, although a citizen of another state, might evade service indefinitely by fleeing into the district where the plaintiff resides, and, by remaining there until he could secrete or convey all his property, might defeat all means of rendering available any judgment which the plaintiff might recover against him in the federal courts. The right secured, therefore, by the provision, is plainly one of importance, and one that ought not to be impaired or frittered away by construction. Important as the right is, however, it must not be forgotten that it is conferred only under the special circumstances described in the provision, and if those circumstances are wanting, then the right does not exist.

§ 1627. *When a party is inveigled into a district by false representations, or detained there by improper contrivance or illegal arrest, he cannot be said to be found there within the meaning of the statute. Authorities cited.*

When the party defendant is found in such district he may then be lawfully served with process; but it cannot be said that he was so found there if he was inveigled or enticed into the district for the purpose of making such service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by any one acting in his behalf. Abuse of legal process in any form has always been frowned upon by courts of justice, whenever and wherever the fact has been made to appear, and the party practicing it is never allowed to reap the fruits of his wrongful act. Where the defendant was first arrested without process and detained until process could be procured, and while so unlawfully detained was served with legal process, it was held that inasmuch as the original arrest was illegal, the subsequent confinement under legal process was also illegal, and the defendant accordingly was unconditionally discharged. *Barlow v. Hall*, 2 Anstr., 461. The arrest was also held illegal and the defendant discharged in *Birch v. Prodger*, 1 New R., 135, because the defendant was first seized by the plaintiff in the street and carried by him to the office of an attorney, and there detained until the process already issued and in the hands of the officer could be sent for and served. See, also, *Loveridge v. Plaistow*, 2 H. Bl., 29. The general rule, however, is that a person illegally in custody at the suit of one party is not privileged from arrest at the suit of another, unless there is some proof of concert or collusion, because in the absence of such proof it cannot be assumed that the latter party has been guilty of any abuse of legal process or of any wrongful act whatever. *Barclay v. Faber*, 2 Barn. & Ald., 743; *Howson v. Walker*, 2 W. Bl., 823; *Davies v. Chippendale*, 2 Bos. & Pul., 282; *Egginton's Case*, 2 El. & Bl., 735. The rule, of course, would be otherwise if the party was not subject to arrest, as is admitted in all the cases establishing the preceding general rule. *Spence v. Stuart*, 3 East, 89. Improper contrivance also, as well as a prior illegal arrest and subsequent detention, will render the service illegal and entitle the defendant to an unconditional discharge. Consequently, where a respondent in an equity suit was in contempt for not filing an answer, and the complainant having procured an order of attachment against him, and being unable to serve it, caused the respondent to be personally examined in certain insolvent proceedings pending against him in another tribunal, and as the respondent retired

from the room after his examination served him with the attachment process, it was held that the arrest was illegal and that he should be discharged, because he had been arrested by a deceptive and improper contrivance. *Snelling v. Watrous*, 2 Paige, Ch., 314. The same principle is also laid down in *Wells v. Gurney*, 8 Barn. & Cress., 769, where it was held that a defendant, arrested on Sunday for an assault actually committed, but for the real purpose of detaining the defendant until Monday so that he might be arrested in a civil suit, was entitled to a discharge from the arrest in the civil suit because the arrest had been effected by an abuse of legal process and by deceptive means. Courts of justice everywhere regard the procurement and use of one legal process merely for the purpose of arresting a party and detaining him in custody until he can be served with another process, as such an abuse of process as will at least render the second service utterly unavailing to the party making it, and cases may be found where it has been held that the party arrested was entitled to be discharged from both upon an *ex parte* application to the court. *Ex parte Wilson*, 1 Atk. Ch., 152. Whether or not the rule ought to be extended so far, it is not necessary now to determine, but it is clear that the service of the latter process in the case stated was illegal, and was properly set aside. Several cases also are cited by the defendant in which it was held that if a party upon whom process is served, and who at the time was residing in another jurisdiction, was induced to come into the jurisdiction of the court where the suit was commenced by a deception practiced upon him by the plaintiff for the purpose of serving the process, such service is not good, and that the court will set it aside and dismiss the suit. Such were the views of the court in *Williams v. Reed*, 5 Dutch. (N. J.), 385, which is a case directly in point under the theory of fact set forth in the motion. Express adjudication to the same effect is also to be found in *Carpenter v. Spooner*, 2 Sandf., 717, which is entitled to much weight. An examination of these cases and others cited by the defendant satisfies the court that the proposition of the defendant, as stated in the motion, is correct, that where the defendant, residing in another district, is inveigled, enticed and induced to come into the district where the plaintiff resides, by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon the defendant, and the same is served through such improper means, such service is illegal and ought to be set aside, and that the process should be dismissed.

§ 1628. *The proofs in this case do not show service by improper means.*

But the proofs in this case do not show that the defendant was first seized without process, and detained until process could be obtained and served, nor that he was arrested and held upon process obtained for the mere purpose of so arresting and detaining him until the process in question could be obtained and served upon him. Nor do the proofs show that the plaintiffs, or any one in their behalf, were guilty of any misrepresentations or practiced any deceptive contrivances to entice or inveigle the defendant into this district to serve him with the process under consideration. All these conclusions of fact are admitted by the defendant, and, in admitting them, he also admits, in the view of the court, that his motion must be denied.

The proposition of the defendant is that the inventor is interested in the patent, and that, inasmuch as he invited the defendant to come into this district, and the defendant came in pursuance of such invitation, neither the corporation nor its officers, while he was here under that invitation, could sue out process returnable in this court, and cause the same to be served upon the de-

fendant. The argument is that the inventor, although he had assigned the entire legal title to the corporation, nevertheless, under the agreement before mentioned, sustained to the corporation the relation of a partner in interest, and that, sustaining that relation, and having invited the defendant to come here, the corporation could not sue out process here and make service upon the defendant under the before-mentioned provision of the judiciary act. But the proposition cannot be sustained for several reasons, any one of which is conclusive against it, and sufficient to show that it is wholly untenable. The corporation held the entire legal title to the patent, and consequently had the exclusive right to determine whether or not a suit should be instituted. They had no knowledge of the acts of the inventor, and, as the inventor was not their agent in any sense, they could not be affected by his acts. He did not profess to act as their agent, and did not act in their behalf, which was well known to the defendant. Neither the corporation nor its officers committed any wrongful act either in suing out the process, or in directing it to be served by the marshal. The inventor did no wrongful act in writing the letters, or in extending the invitation to the defendant to come here and make an effort to adjust the controversy, as all he did and said was merely advisory, and without any improper intent. Where there is no false representation and no deceptive contrivance and no wrongful act of any kind done by the plaintiff, or by any other person in his behalf, to entice, inveigle or induce the defendant to come into the jurisdiction where the plaintiff resides, for the purpose of serving him with process, it is competent for the plaintiff to sue out process and have it served; and such service is legal, and cannot be set aside or the process dismissed, because made returnable and served in the district where the plaintiff resides.

The motion is overruled and denied.

SMITH v. TUTTLE.

(Circuit Court for Illinois: 5 Bissell, 159, 160. 1870.)

STATEMENT OF FACTS.—Proceeding against defendant in a district in which he does not reside, service being had upon him while upon a visit. Plea to the jurisdiction, to which the plaintiff demurs.

§ 1629. *Jurisdiction is not obtained against a defendant by service upon him while temporarily visiting within the district.*

Opinion by BLODGETT, J.

This matter was called up during Judge Davis' visit to this city, and the authorities examined, and Judge Davis, Judge Drummond and myself all came to the conclusion, in the light of the authorities, that this court has no jurisdiction over a citizen of another state who is temporarily found here long enough to be served with process; that the acts of congress conferring jurisdiction do not contemplate that a defendant shall be sued out of the state where he resides; that he has the privilege of litigating a question in the federal courts between himself and a citizen of another state in the state of his own residence. The demurrer will therefore be overruled.

WILSON v. GRAHAM.

(Circuit Court for Pennsylvania: 4 Washington, 53-59. 1821.)

STATEMENT OF FACTS.—This was a libel to enforce against Graham a decree rendered in Rhode Island against a box of silk, etc., condemned as prize, which,

it was asserted, had come to the hands of Graham. Graham pleaded that he had never been summoned to appear in the Rhode Island court; that he was not a citizen of that state, nor had he been found within it. Plaintiff demurred to this plea. The libel was filed in the district court and appealed from a *pro forma* decree.

Opinion by WASHINGTON, J.

This case turns exclusively upon the question whether the circuit court for the district of Rhode Island had jurisdiction in the case wherein the decree which this libel seeks to enforce was made? If it had, then it is clearly conclusive upon this court, and it must be carried into effect against Graham. If there was a defect of jurisdiction in that case, it is admitted by the appellant's counsel that the decree ought not to be enforced by this court.

In the case *Ex parte* Graham [4 Wash., 211; §§ 1634-37, *infra*], which terminated in the discharge of the appellee from arrest, under the process of attachment issued by the circuit court of Rhode Island in this very case, the following points were resolved: 1. That the federal circuit and district courts of one state have no authority to issue process into any other state to compel an appearance in those courts, whether in a matter at common law, in equity, or of prize or no prize. 2. That the jurisdiction of those courts, though sitting in prize causes, is limited in point of locality by the bounds of their respective districts, except in a few cases particularly provided for by law. 3. That it is essential to the jurisdiction of those courts that the *person* or *thing*, against which the proceedings are directed, should be within their local jurisdiction; except in the latter case, when the thing is considered as being constructively within their jurisdiction; as where it is in possession of the captors, though in a neutral country. 4. That if a prize proceeding be instituted against the *person*, the jurisdiction is excluded, unless it be in a court of the district whereof the person is an inhabitant, or in which he is found at the time of serving the process.

§ 1630. *The circuit or district courts of the United States have no jurisdiction over the persons of parties not residing or found within the district.*

If these principles be correct (and after an attentive reconsideration of them we think they are), it follows that the circuit court of Rhode Island had no original jurisdiction over the person of Peter Graham, because the process of that court could not legally issue into this district, and be *here* served upon him; nor was it served upon him in *that* district; he was not bound to appear and to make himself a party to the suit. Can he, then, be personally bound by a sentence given in a suit in which he was not a party, nor was heard, or could be heard, in his defense? Such a doctrine cannot, we think, be maintained. It is repugnant to the immutable dictates of justice as well as to the express provisions of the eleventh section of the judicial act, which provides "that no civil suit shall be brought before either of the said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ." For, if the court can exercise jurisdiction in a case and over a person who has not and could not be legally served with its process, the above provision was quite nugatory, and afforded no protection to those for whom it was designed. We have no doubt but that the learned judge who passed that decree, presuming that, in respect to the process, all had been rightfully done (for Graham had no person to represent him in court and to place that matter in its true light), had no reason to question his jurisdiction.

§ 1631. *The decree of a federal court will be carried into effect by a like court in another district as to the "thing" of which the former court had jurisdiction, or the person who had it in possession.*

I admit that that court had unquestionable jurisdiction over the box of merchandise alleged to be in the possession of Graham, and as to that or its proceeds the sentence of that court is conclusive, not only as to its correctness, but as to everything which it professes to decide. And this court would not hesitate to execute that decree against the appellee were a proper application made for that purpose, and if it appeared in proof that he had or has the thing or its proceeds in his possession. *As to the thing*, Graham and all other persons claiming an interest in it, either on the ground of property or of possession, were parties to that suit, and were represented in court by the thing which was the subject of the court's jurisdiction, although they were never served with process nor had even heard of the suit. It is upon this ground that the *res* or its proceeds may be followed by the decree of this court into the hands of any person who may have the same in his possession, and who is personally within its jurisdiction. But whether the appellee has, or ever had, in his possession the merchandise mentioned in the decree, or its proceeds, is a fact which this court cannot consider as established by the decree of the circuit court of Rhode Island, inasmuch as the appellee was no party to that suit.

It is contended that the decree against Graham was not founded on original process, but was merely an incident to the original suit, in which the box of merchandise was condemned to the captors. This is not quite correct, since the sentence against Graham was not for the thing condemned or its proceeds, but for a gross sum. But were it otherwise, still the suit against Graham was an original one, in which the question to be decided was not whether the goods were legally condemned to the captors, but whether they had come to the hands of the person against whom the suit was prosecuted. And this is the very question which, for the reasons before mentioned, that court was incompetent to decide. At every turn that this case is presented to our view, it is met by the objection that the circuit court of Rhode Island had not cognizance of the matter upon which its sentence was founded.

§ 1632. *Where a specific relief is asked, the court will not grant a relief inconsistent with it.*

Again, it is said that, as the libel in this case setting forth the sentence of condemnation, as well as the decree *in personam* against Graham, and the plea, by avoiding the charge of possession, and merely alleging matter in bar of the relief prayed, admits the fact that the appellee was so possessed, there can be no solid reason why the court should not now execute that decree. The conclusion of the counsel is clearly drawn from mistaken premises. The libel sets forth no part of the proceedings of the Rhode Island court but the complaint of Wilson, supported by proof that the box of merchandise imported in the *Francis*, and condemned as lawful prize to the captors, was delivered by mistake to Stewart, the proceedings against him, the suggestion and proof that the said merchandise, or the proceeds thereof, came to the hands of Graham, and the process against him, followed up by the decree to pay \$2,000 into the registry of that court, and the execution founded thereon returned unsatisfied. The prayer of the libel is *that the said decree against P. Graham* may be carried into execution by a decree of this court. It is manifest, therefore, that, although the sentence of condemnation is mentioned, it is merely by way of recital in the complaint of Wilson against Stewart; that the only decrees set

forth in this libel are those against Stewart and Graham; and that the latter is the only one which the libel prays the aid of this court to execute.

Now it is perfectly clear that, according to the practice of the court, where a specific relief is asked for, even although there be a prayer for general relief (which there is not in this case), the court cannot grant a relief which is inconsistent with or entirely different from that which is asked for. Much less can the court, in a case where the libel seeks execution of a decree which is specially set forth, execute a different decree, which is not even stated in the libel as an existing and final decree. If the practice were otherwise, it would be not only unnecessary to state the relief which is desired, but it would be mischievous to do so, as it could only serve to deceive the other side.

§ 1633. *A respondent may in a proper case put into a plea matter which amounts to a bar of the action.*

Neither is it correct to say that the plea, by not denying possession of the merchandise, admits it. In the first place, that fact is not charged in the libel, nor is it proved by the decree, for the reasons before mentioned. And even if it were charged, still it must have been upon the conclusive effect of the decree, from which the respondent could, in no other way, have extricated himself but by showing that the court which pronounced it had not jurisdiction in the case. I will not say that the respondent in the district court might not have stated all the matter of the plea in an answer, and also have denied the fact of possession. But then the latter part of his defense would have been merely gratuitous, and not being responsive to the libel in that respect, it could not have availed him. It is, after all, to be remarked that the respondent is never *bound* to reserve to the final hearing any matter which amounts to a bar of the relief prayed, but may by a plea demand the judgment of the court upon such matter, so as to save the expense of a general examination.

The decree of the district court must be affirmed, with costs.

EX PARTE GRAHAM.

(Circuit Court for Pennsylvania: 4 Washington, 211-214. 1818.)

Opinion by WASHINGTON, J.

STATEMENT OF FACTS.—To the writ of *habeas corpus* issued by this court upon the petition of Peter Graham, the marshal has returned that he arrested the petitioner under the authority of a warrant of attachment issued from the circuit court of the United States for the district of Rhode Island, to him directed, which is annexed to the return. The question turns upon the authority of the district or circuit court of one district to issue its process into any other district, to compel the appearance of a person not residing or found within the jurisdiction of the court from which the process issued, or to stand committed for any alleged contempt of that court.

§ 1634. *The federal courts, in the exercise of their common law and equity jurisdiction, cannot issue process beyond the limits of their districts.*

It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States. The absence of such a power would seem necessarily to result from the organization of the courts of the United States, by which two courts are allotted to each of the districts into which the United

States are divided, the one denominated a district, and the other a circuit, court. This division and appointment of particular courts for each district necessarily confines the jurisdiction of these local tribunals within the limits of the respective districts within which they are directed to be holden. Were it otherwise, and the court of one district could send compulsory process into any other, so as to draw to itself a jurisdiction over persons and things without the limits of its district, there would result a clashing of jurisdiction between the different courts not easily to be adjusted, and an oppression upon suitors too intolerable to be endured.

But the legislature of the United States, from abundant caution as it would seem, has not left this subject to implication. After conferring upon those courts respectively the portion of jurisdiction which congress intended they should exercise, the eleventh section of the judicial act of 1789 proceeds to prescribe territorial limits to their jurisdiction by declaring "that no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court, nor can a civil suit be brought in either of those courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." These provisions appear most manifestly to circumscribe the jurisdiction of those courts, as to *the person* of the defendant, by the limits of the district where the suit is brought; and that the process of those courts was considered by the legislature to be bounded by the same limits is very obvious from two subsequent acts passed, the one on the 2d of March, 1793, authorizing subpoenas for witnesses to attend in the courts of one district to run into any other district not exceeding, in civil cases, one hundred miles from the place of holding the court; and the other on the 3d of March, 1797, which authorizes writs of execution upon judgments obtained *at the suit of the United States* in any of their courts in one state, to run and be executed in any other state or territory.

It is very apparent that these provisions were made, not because they were supposed by congress to be necessary in consequence of the eleventh section of the judicial act before recited, but because the jurisdiction of the courts was essentially confined by their organization within the limits of their respective districts; for it is to be observed that that section applies exclusively to *original suits* and to the *parties to those suits*, and therefore it imposed no restraint as to writs of execution and subpoenas for witnesses, so as to render the above provisions at all necessary.

§ 1635. *The federal courts in admiralty, though unlimited in their jurisdiction as to subject-matter, are limited in point of locality by the general principles of law.*

But it has been argued that these restraints are incompatible with the essential jurisdiction of an admiralty court, more especially in prize causes. That the laws of the United States authorize the distinction which is contended for, between the courts of common law and equity and the admiralty jurisdiction in prize cases, has not, and it is confidently believed cannot, be shown. It is true that the ninth section of the judiciary act gives to the district courts exclusive original cognizance of *all* civil causes of admiralty and maritime jurisdiction without limitation; and it is not less true that the eleventh section gives to the circuit courts original cognizance *of all suits of a civil nature*, at common law and in equity, when an alien is a party, or the suit is between a

citizen of the state where the suit is brought and a citizen of another state, equally unlimited, except as to amount. But the jurisdiction of these courts, though unlimited as to the subject-matter over which they have cognizance by any express declaration of the legislature, is nevertheless limited in point of locality, as well by the general principles of law which our courts acknowledge as rules of decision, as by the express provisions of the eleventh section of the judiciary act before mentioned. As to the first, it will be acknowledged that there is no law of congress which limits the jurisdiction of the courts *by the nature of the suits* of which they have cognizance. By what law then is it that local actions, such as ejectment, dower and trespass, in relation to real property, can be sustained only in the court of that district where the land lies? If the defendant be served with the process in the district where the suit is brought, neither the eleventh section, nor any other provision in the acts of congress, has restrained the jurisdiction of the court in the supposed cases. The only answer to the question is, that the want of jurisdiction is the result of certain general principles of law acting upon the particular subject. In like manner the jurisdiction of these courts, when sitting in an admiralty or prize cause, is limited by those general principles which apply to courts of admiralty in England and the United States. Though bounded only by the nature of the causes over which they are to decide, and not in any respect by *place*, that is by the place where the fact occurred which constituted it a case of admiralty jurisdiction, it is nevertheless essential to the exercise of this jurisdiction by any particular court, that the person or thing against which the court proceeds should be within the local jurisdiction of such court. Such was the jurisdiction of the several vice-admiralty courts of Great Britain in America and in the West Indies, until the statute of the 41st of Geo. III.: whether acting as instance or prize courts, it was confined to breaches of the revenue laws committed within their local jurisdictions, and to cases of vessels, etc., brought within the same. The only exception to the general rule here stated, applicable to the court of admiralty in a prize cause, is that of a prize lying in the port of a neutral country, most unwillingly assented to by Sir W. Scott under the sanction of precedents, but powerfully opposed by the reasons urged against it by that distinguished judge. But, even in that case, it was never pretended that the process of the court could go into the neutral country where the *corpus* may be, to compel an appearance, or to enforce execution of the sentence.

From the above course of reasoning it follows, that though the jurisdiction of the district courts in civil causes of admiralty and maritime cognizance is unlimited, yet in the exercise of that jurisdiction, the court is circumscribed by the district for which it is appointed.

§ 1636. *The jurisdiction of the admiralty courts is limited as to persons by express provisions of statute.*

But secondly, it is limited as to *persons*, by the express provisions of the eleventh section of the judiciary law before so often referred to. A prize proceeding is most unquestionably a civil suit, and if it be against *the person* of an inhabitant of the United States, and not against *the thing*, the jurisdiction is excluded, unless it be instituted in the court of the district whereof he is an inhabitant, or is found at the time of serving the process. The manifest policy of the judicial system of the United States was to render the administration of justice as little oppressive to its citizens as possible.

§ 1637. *Had the court power to issue process into another district, no mode of executing such process is prescribed.*

To the exercise of a jurisdiction over a person not an inhabitant or found within the district where the suit is brought there is a difficulty which, in the opinion of the court, nothing but an act of congress can remove. In what manner is the marshal to dispose of his prisoner? He has no authority to conduct him beyond the limits of his district, nor to deliver him over to the marshal of an adjoining district. Can he commit him to the gaol of the district where the arrest was made? If he can, the case would present a very extraordinary novelty in jurisprudence; that of a defendant imprisoned in one district to answer to a suit depending against him in another, no matter how great the distance, and consequent difficulty of making his defense. In criminal cases, where the offender is arrested in one district for trial in another, the thirty-third section of the judicial law has provided, not only for the removal of the offender and witnesses, but also for the transmission of the process and recognizances taken in the case, to the proper court. In like manner, should it be the will of congress to vest in the courts of the United States an extraterritorial jurisdiction in prize causes, over persons and things found in a district other than that from which the process issued, it would seem to be proper, if not absolutely necessary, at the same time to prescribe the mode of executing the process. Upon the whole we are of opinion that the petitioner ought to be discharged.

UNITED STATES *v.* OTTMAN.

(Circuit Court for Virginia: 1 Hughes, 313-321. 1877.)

STATEMENT OF FACTS.—Action was commenced by attachment in a state court, and removed by plaintiffs to the circuit court. The defendant Ottman was in jail in the District of Columbia, on a charge of stealing from the United States \$47,000. To recover a portion of that sum this suit was brought. There was a special appearance, motion to quash, plea that defendant was in jail, demurrer, and a plea to the jurisdiction, on which last issue the case was heard.

Opinion by HUGHES, J.

This is an action in which the United States is complainant, and not one between citizen and citizen, in which either plaintiff or defendant must be a non-resident, in order that the court shall have jurisdiction. It is a suit which, to be effectual to secure the money claimed of the German Banking Company, must of necessity be brought in this district, and could not reach the money if brought in the District of Columbia. The object of the suit cannot be attained by suing elsewhere; and this suit, to accomplish the ends of justice by securing a trial on the merits, must proceed either in the state court or in this court. It is a case, therefore, for a liberal and not a narrow or technical construction of the law regulating the jurisdiction of the court.

§ 1638. *Statutory provisions bearing upon this case.*

The provisions of law on which that jurisdiction depends are as follows: Section 1 of the act of congress of March 3, 1875 (which appears as chapter 137 of the acts of 1874-5; vol. 18, p. 470, of the United States Statutes at Large), provides, in substance, that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all

suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, in which the United States are plaintiffs or petitioners. But no civil suit shall be *brought* before a circuit court of the United States against any person *by any original process* or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, *except as hereinafter provided*.

Section 2 provides that in any suit of a civil nature, at law or in equity, hereafter brought in any state court, where the matter in dispute exceeds the sum or value of \$500, in which the United States shall be plaintiff or petitioner, either party may remove said suit into the circuit court of the United States for the proper district. On being so removed, *the cause shall then proceed as if it had been originally commenced in the said circuit court*. And section 4 of the act in question provides, in substance, that when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree, *in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced*, etc. This act of congress is substantially the same as the corresponding sections of the judiciary act of 1789.

§ 1639. — *review of the decisions upon the above legislation.*

The decisions of the United States courts under this legislation of congress have been as follows: In *Pollard v. Dwight*, 4 Cranch, 421, the proceeding was commenced by process of foreign attachment in the state court, and was removed by the defendants into the United States circuit court for that judicial district. The supreme court held that by appearing and pleading to issue the defendant waived all objection to the service of process. In *Toland v. Sprague*, 12 Pet., 330, where suit was commenced in the federal court by foreign attachment, the supreme court decided that the process of foreign attachment cannot properly issue from a circuit court of the United States against the property of a person not resident in the judicial district for which the court is held, but that if a non-resident defendant appears to such process, and pleads to issue, he waives his exemption from liability to the service of process against him, and the court thereby acquires jurisdiction.

In *Levy v. Fitzpatrick*, 15 Pet., 171 (APPEALS, §§ 319-20), the court says: "No judgment can be rendered by a circuit court against any defendant who has not been served with process issued against his person in the manner pointed out in section 11, judiciary act of 1789 (section 1 of act of 1875), unless the defendant waive the necessity of such process by entering his appearance to the suit." In *Day v. Hayward*, and *Chaffee v. Same*, 20 How., 214, the court held in the general terms which it had used in *Levy v. Fitzpatrick*. That case was one where the suit was brought in the United States circuit court against a non-resident, and, on failure of the marshal to find the defendant, process of attachment had been taken out against the defendant's estate in accordance with the practice observed in the courts of that state. At the hearing the defendant had not appeared nor pleaded to issue, and it was held that there was no jurisdiction.

In *Herndon v. Ridgway*, 17 How., 424, which was a suit in equity against several defendants who were non-residents, and who had not been served with process, the court said: "The jurisdiction of the circuit court over parties is

acquired only by a service of process or their voluntary appearance. It has no authority to issue process to another state. In the present case the defendants decline to appear, and process cannot be served, so that the court is without jurisdiction over the essential parties to the bill.”

In *Sayles v. Northwestern Ins. Co.*, 2 Curtis, 212, it was decided that, where a suit was commenced by foreign attachment in a state court, if the defendant appears there and by motion removes the cause to the circuit court of the United States, it is then too late to object to the jurisdiction of that court, or to raise the objection in the United States court of non-residency in the judicial district. Five years after the decision of the supreme court in *Day v. Hayward*, which was the latest of the cases cited above, the case of *Barney v. The Globe Bank of Boston*, 5 Blatch., 107, was decided. It was there held that a suit commenced in a state court by attachment upon property of a non-resident defendant, without personal service upon the defendant, was within the meaning of the law of the United States relating to the removal of suits, and that the federal court has jurisdiction of the cause, if properly removed, whether the defendant appears or not, although it would not have jurisdiction to compel the attendance of defendant if the suit had been originally brought in that court.

In the cases in *Cranch*, in *Curtis*, and in *Blatchford*, the suits were commenced by attachment against the property of the non-resident defendant in the state court, and in each case the suit was removed into the federal court on the motion of the defendant. In each case the jurisdiction of the federal court was sustained. In the cases in 12 Peters and 20 Howard suit was commenced by attachment in the federal court. In one of them the defendant appeared and pleaded to issue, and was held to have waived thereby his right of objection to the jurisdiction. In the other the defendant did not appear or plead to issue, and it was held that there was no jurisdiction to compel him to do so.

In the cases in 15 and 17 Peters it was decided, generally, that judgment or decree cannot be rendered against a defendant unless service of process has been made upon him in the manner required by the eleventh section of the act of 1789 (section 1 of act of 1875). The case now before us being one properly commenced in a state court, and properly removed to the federal court, it would seem to fall within the control of the decisions in *Cranch*, *Curtis* and *Blatchford*, and, being dissimilar in essential particulars from those in *Peters* and in *Howard*, which were not removed suits, would seem not to be governed by those cases.

§ 1640. *Jurisdiction to remove a suit carries jurisdiction to proceed.*

There can be no doubt that the suit was rightfully brought in the state court. It is not pretended but that that court possessed full jurisdiction to entertain and proceed in it. There can be no doubt that it was a removable suit, and that it has been removed here regularly, legally, and by proper proceeding. Indeed, counsel for defendant argued affirmatively that all these things were so, except the second proposition, as to which they maintain that it ought to have been a suit at law, and not in equity. They only contend that, now that the suit has got here, this court cannot proceed with it for want of jurisdiction *to proceed*. But I think jurisdiction to remove carries jurisdiction to proceed. Section 1 of the act of 1875 provides only that such a suit as this shall not be *brought here by original process*. As this suit was not originally brought here, nor brought here at all by original process, that prohibition of the statute is not violated. True, the statute requires that, after a suit is removed here, it

shall be proceeded in as if it had been originally commenced here; and it is contended that this requirement means *only* as "if originally commenced" here, and that, inasmuch as the suit could not have been commenced here at all, it cannot be proceeded in here at all.

Such a construction of the clause relied on would lead to the mockery of allowing a cause, proper for removal under the law, to be removed only for the purpose of turning it out of court. Such a construction is, of course, not to be given, if it can be avoided. Happily, this construction is especially forbidden by section 4 of the act, which makes an exception to this requirement of such suits as are commenced in state courts by attachment, and provides that, where any removed cause has been so commenced in the state court, such attachment shall hold the goods in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced. This provision would be a mockery if the view of the defendant's counsel were correct. How could the money attached in the hands of the German Banking Company be held in this cause for such decree as the state court could have given, if no further step could be taken here, especially if, as defendant's counsel contend, the suit cannot now be remanded to the state court? Surely congress could not have intended that such an absurdity of consequences should be reached by judicial proceedings taken under its legislation.

The view of Mr. Justice Curtis, fully sustained by Judge Shipman, ought therefore in my judgment to prevail, that if the suit be one rightfully brought in the state court, and which the act of congress authorizes to be removed thence into the federal court, the very fact of authority to remove empowers the federal court to take jurisdiction and proceed in the cause; the only real question in that court being, *was the suit rightfully removed?* If a cause has thus come into the federal court, then section 4 of the act empowers and requires that court to go on with it, and to give such decree against the property attached as the state court should have given if the suit had remained there.

§ 1641. *Congress has power to give the federal courts jurisdiction over defendants non-resident within the district.*

Congress has full constitutional power to give the United States courts jurisdiction over defendants non-resident in the districts in which suits against them are brought; and it has, in sections 2 and 4 of the statute under construction, given this power in the single instance of suits commenced by attachment in state courts, and removed into United States courts. This can easily be made apparent.

§ 1642. *Distinction between suits begun in federal courts and attachment suits removed from state courts.*

It must not be overlooked that section 1 avoids the use of such language as would embrace removed attachment suits commenced in state courts, in the class of suits in which, in order that the federal courts may have jurisdiction, it requires that defendants must live, or be served with process, in the judicial districts where the suits are brought. As if to discriminate attachment suits removed out of state courts, from suits commenced in the federal courts, section 1 is particular to say that no civil suit shall be *brought in a federal court by any original process*, in a district where the defendant is not a resident, or is not found; leaving suits *commenced by original process in state courts* out of its purview, to be governed by the provisions of sections 2 and 4, which follow.

Sections 1, 2 and 4 must of course be construed together. When so construed, they induce the following reasoning and lead to the following conclusions: Under section 1, jurisdiction over non-residents is, in general, not given to the federal courts *in any suit commenced by original process in the federal courts*; but under sections 2 and 4 these courts may acquire such jurisdiction, by removal, over attachment suits *commenced by original process in state courts*. For sections 2 and 4 give jurisdiction of removed attachment suits *commenced by original process in state courts*, and this jurisdiction of such suits is good over non-residents, unless it is prohibited by section 1. But section 1 avoids such a prohibition, for its limitation of jurisdiction only applies to suits commenced by original process in the federal courts; these limiting words not only not applying to removed suits commenced by original process in the state courts, but necessarily implying that jurisdiction in such suits is left to be determined by sections 2 and 4.

Moreover, even if the words *no civil suit shall be brought by any original process* in the federal court against a non-resident could be construed as denying jurisdiction of suits brought by original process in the state courts,—even in that event the words at the end of the same clause, *except as hereinafter provided*, would require that the provisions in regard to attachment suits removed from state courts under sections 2 and 4 should be construed as falling within the exception. I must, therefore, overrule the plea to the jurisdiction, and deny the defendant's motion to dismiss for want of jurisdiction.

§ 1643. *A special plea of imprisonment not valid in a civil action.*

As to the plea of imprisonment, personal appearance is not essential in a civil action, and a defendant may be required to make defense by counsel to such an action while in jail. This point has been already overruled in this cause on the motion to quash. See *Slade v. Joseph*, 5 Daly, 187, and *Olery v. Brown*, 51 How. Pr. (N. Y.), 92.

As to the objection intended to be raised on demurrer, that this being a case in which there is claimed to be complete and adequate remedy at law, equity has no jurisdiction, it is enough to say that this suit was brought in a Virginia state court, and that under the laws of Virginia resort may be had by any creditor to a court of equity for an attachment to enforce a purely legal demand against a non-resident defendant.

The statutory provisions allowing this remedy may be found in the state code, and in sections 7, 37 and 181 of Daniel on Attachment. The defendant's intended demurrer to the bill on this ground is therefore overruled. So is his objection to the bill on the ground of multifariousness. This bill has but one object, to secure the payment of the debt directly by the defendant himself, and indirectly by his debtor, the German Banking Company. It is therefore not multifarious. A decree will be entered in accordance with this opinion.

§ 1644. **Attachments.**—The circuit court of the United States has jurisdiction in patent causes. If the defendant is a non-resident and no personal service is made on him within the jurisdiction of the court, the court has no jurisdiction of a personal action, but has jurisdiction of attached property. *Chaffee v. Hayward*, 20 How., 216.

§ 1645. Attachment of property does not give the circuit court jurisdiction over a person not an inhabitant of and not found within the district of the court. *Saddler v. Hudson*, 2 Curt., 7 (§ 1621).

§ 1646. Under section 11 of the judiciary act of 1789, the well settled rule is that suit in a circuit court must be brought either in the circuit where defendant resides or where he is personally served, and no jurisdiction is acquired by attachment of property. This rule ap-

plies as well to suits on patents as where the jurisdiction of the court depends on the fact that the parties are citizens of different states. *Chaffee v. Hayward*, 20 How., 215.

§ 1647. When, in an action of foreign attachment, the suit is brought in a court within whose district the defendant neither lives nor is found, and the only service in the district is upon the garnishees, the court has no jurisdiction of the case. Judiciary Act, 1789, ch. 20, § 11. *Richmond v. Dreyfous*, 1 Sumn., 132.

§ 1648. The provision in the act of June 4, 1880, as to holding the circuit court in Iowa, that "where the defendant is not a resident of the district, suit may be brought in any division where property or the defendant is found," applies only to suits which may be properly brought in the district against non-residents, and does not authorize an attachment of property and institution of suits against non-residents in general. *Ex parte Railway Co.*,* 13 Otto, 794.

§ 1649. — **voluntary appearance.**— The circuit court of the United States cannot properly issue process of foreign attachment against an absent defendant who is not notified, but if he appears and pleads to issue the defect is cured. *Toland v. Sprague*, 12 Pet., 327.

§ 1650. In an action begun against a defendant by attachment of his personal property, if he appears and answers and submits to the jurisdiction of the court, he cannot afterwards object to such jurisdiction. *Maxwell v. Stewart*, 22 Wall., 80.

§ 1651. In a suit to enforce a lien against the property of a non-resident defendant, the circuit court may acquire jurisdiction by service by publication, under Revised Statutes, 738. *Black v. Scott*, 9 Fed. R., 186 (§§ 304-306).

§ 1652. **Voluntary appearance.**— It is not necessary for the record to show that the defendant is an inhabitant of the district of the court or found therein, if he appears without taking exception. *Gracie v. Palmer*, 8 Wheat., 699.

§ 1653. Since the act of February 28, 1839, a party defendant sued out of the proper district may, by voluntarily becoming a party, give to the court jurisdiction to bind him by a decree. *Taylor v. Cook*,* 2 McL., 516.

§ 1654. As between plaintiff and defendant, citizens of different states, any circuit court has jurisdiction if the defendant voluntarily appears and files an answer. *Hubbard v. Turner*, 2 McL., 540.

§ 1655. When a citizen of one state sues a corporation chartered by the legislature of another, in the federal circuit court in a third state, if the corporation enters a general appearance it waives the objection that it is not found in the district of the court. *Flanders v. Aetna Ins. Co.*, 3 Mason, 159.

§ 1656. When service of a subpoena in a suit in equity is made out of the district of the circuit court of the United States in which the suit is brought, the court still has jurisdiction of the cause, if the defendant does not insist on the objection in his answer or before. *Logan v. Patrick*, 5 Cr., 288.

§ 1657. — **by solicitor.**— When defendants are not residents of, nor served with process in, the state where suit is brought in the United States circuit court, the court has no jurisdiction; nor will a docket entry of an appearance for the defendants by a solicitor amount to a waiver of this defense, unless it is shown that they authorized the appearance. *Harrison v. Rowan*, Pet. C. C., 490.

§ 1658. — **certiorari from circuit to district court.**— The United States circuit court has no authority to issue a writ of *certiorari* to remove a case from the district court before final judgment, but if the defendant enters his appearance in the circuit court, makes defense and pleads to issue, he waives this irregularity. *Patterson v. United States*, 2 Wheat., 225.

§ 1659. — **suit relating to land.**— When a defendant is properly sued in the circuit court of the United States, as being a citizen of another state from the plaintiff, and voluntarily appears and answers, the court will take jurisdiction of the suit, although it concerns land lying outside the jurisdiction of the court, and the decree of the court could not be immediately effective as a transfer of the lands. *McLean v. Lafayette Bank*, 3 McL., 622.

§ 1660. When a suit affecting land in Virginia was brought by citizens of Massachusetts and Connecticut in the circuit court of the United States, against a citizen of Virginia, although the court would have had no jurisdiction if the defendant had not appeared and answered, nor been personally served, yet an appearance and answer waived all such defects of service. *Pollard v. Dwight*, 4 Cranch, 428.

§ 1661. — **to resist amendment.**— When during the pending of a suit in the circuit court, plaintiff asks leave to amend, and defendant appears by his counsel to resist, defendant cannot afterwards object to the jurisdiction over the amended bill on the ground that he had been out of the district and therefore not properly served with notice, and that his counsel's appearance was merely special. *Ward v. Todd*,* 13 Otto, 327.

§§ 1662-1669. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

§ 1662. — where parties are residents of the same state.— Where complainant and one of the parties defendant are citizens of the same state, the circuit court has no jurisdiction, and does not acquire it by the appearance and consent of the defendant. *Ketchum v. Farmers' Loan and Trust Co.*,* 4 McL., 1.

8. Amount.

SUMMARY — *How to be alleged*, § 1663.— *Jurisdiction depends on amount stated*, § 1664.— *Matter in dispute in ejectment suits*, § 1665.— *How determined from the record*, § 1666.— *Amount is aggregate of all the counts*, § 1667.— *Jurisdiction not affected by verdict*, § 1668.

§ 1663. The sum or value of the matter in dispute is a jurisdictional fact, always to be alleged and proved, except that where the demand is not for money, and the nature of the declaration does not require a statement of the value, the practice is to allow the value to be stated in the evidence. *Crawford v. Burnham*, §§ 1669-70.

§ 1664. Jurisdiction is determined by the amount stated in the declaration, though upon trial it should appear less. *Ibid.*

§ 1665. In ejectment suits sounding in damages, but really involving only the question of title to land, the matter in dispute is the land, and unless this be worth in excess of \$500, there is no jurisdiction, although the damages claimed exceed that amount. *Ibid.*

§ 1666. In determining jurisdiction with reference to the amount in dispute, the court will look rather to the statements in the body of the complaint than to the amount claimed in the prayer. When the amount is not fixed, jurisdiction is determined by the amount claimed. *Culver v. Crawford County*, §§ 1671-72.

§ 1667. The amount in dispute is the aggregate of the claims in all the counts properly joined, not merely the demand in one count. Hence the court has jurisdiction of a suit for \$550 upon eleven coupons of \$50 each, though these are set forth in eleven counts. *Judson v. Macon County*, § 1673.

§ 1668. The damages sued for, and not those awarded by the jury, determine the question of jurisdiction. *Murphy v. Howard*, § 1674.

[NOTES.— See §§ 1675-1688.]

CRAWFORD v. BURNHAM.

(Circuit Court for Michigan: 1 Flippin, 116-119. 1871.)

STATEMENT OF FACTS.— Ejectment for lands in Michigan. Damages laid at \$10,000. Value of lands not stated. Plaintiff gave evidence as to the value of the lands, but failed to show that they were worth over \$500. The question was then raised by the defendant whether the court could hold jurisdiction, as the lands did not appear to be worth \$500.

§ 1669. *The sum or value of the matter in dispute is a jurisdictional fact to be alleged and proved.*

Opinion by LONGYEAR, J.

Under section 11 of the judiciary act of 1789 (Stat. at Large, 78), defining the jurisdiction of the circuit court, the existence of the fact that "the matter in dispute exceeds, exclusive of costs, the sum or value of \$500," is just as necessary as that "the suit is between a citizen of the state in which the suit is brought and a citizen of another state," or any other jurisdictional fact prescribed by said section. Where the "sum or value" is stated in the declaration jurisdiction will be determined by the amount so stated, and when the amount so stated is sufficient to confer jurisdiction, such jurisdiction will not be affected, even though it should appear upon the trial that such "sum or value" is really less than the required amount. *Gordon v. Longest*, 16 Pet., 97; *Hulscamp v. Teel*, 2 Dall., 358. Where, however, as in this case, the demand is not for money, and the nature of the declaration does not require the value of the thing demanded to be stated in the declaration, the practice of the United

States courts is to allow the value to be given in evidence, as was done in this case. See *Ex parte* Bradstreet, 7 Pet., 634, 647; *Green v. Lister*, 8 Cranch, 229; *Hartshorn v. Wright*, Pet. C. C., 64. It is clear, however, by necessary inference from the cases above cited, as well as on principle, that in such cases the value of "the matter in dispute" must be either alleged or proven to exceed the sum of \$500, and that in the absence of both such allegation and proof there is no jurisdiction, and the suit must be dismissed.

By the statutes of Michigan, which govern in this case, the action of ejectment is extended and enlarged so as to comprehend and include all cases in which it was formerly necessary to bring a writ of right, which latter writ is abolished. 2 Compiled Laws of Michigan, 1230, secs. 8, 4551, 4741. So that now the plaintiff in this action may set up and put in litigation the fee itself (as the plaintiffs have done in this case), or any less estate, as well as the mere right of present possession; and to this end it is further provided in the same statutes, p. 1231, sec. 4563, that "in every other case" than where the action is brought for the recovery of dower, "the plaintiff shall state" in the declaration whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years or otherwise; specifying such lives or the duration of such term. And the judgment is made conclusive "as to the title established in such action" upon the party against whom the same is rendered, whether plaintiff or defendant of course, and against all persons claiming under such party by title accruing after the commencement of the suit. See p. 1236, secs. 4588, 4590.

§ 1670. *In ejectment suits sounding in damages, but in which the real question is one of title to land, the "matter in dispute" is the land itself, and not the damages claimed.*

What then is the thing demanded, "the matter in dispute," in ejectment suits? Clearly, and it seems to me indisputably, it is the estate, title, interest or right in and to the lands in question, set up and claimed in the declaration. It is as to these that the plaintiff is expressly required to be specific in stating what he claims, as to what an issue is joined, and judgment is given. It is true, the action sounds in damages as well. It is to be observed, however, that it sounds in damages only, the recovery of damages not being its original or principal purpose. Damages in such case, under the main issue as to the right, title or estate, are given only in case of recovery by plaintiff upon that issue, and are for the supposed trespass by the defendant in unlawfully withholding possession from the plaintiff, and have no reference to the value of the land. They are, therefore, merely incidental to, and contingent upon, the result of the main issue. It is to be observed, moreover, that under this issue the damages are, in practice, only nominal. That they were so regarded by the legislature is evident from the fact that in the statutes, before alluded to, such damages are expressly so nominated. 2 Compiled Laws of Michigan, 1231, sec. 4560. See, also, *Lanning v. Dolph*, 4 Wash., 624, 627. Formerly, the real damages in such cases could be recovered only in a separate action. Now, they may be recovered in the same suit, but not in or by the verdict and judgment upon the main issue. Such recovery can be had only after such verdict and judgment, and upon a new issue joined upon a suggestion of damages, as required by the statutes before alluded to. 2 Compiled Laws, 1237, sec. 4596 *et seq.* I hold, therefore, that in the action of ejectment, the land and premises demanded, when claimed by the plaintiff in fee, as in this case, or when a less estate than the fee is claimed, then the estate, title, interest or right claimed, as

set up in the declaration, is "the matter in dispute" within the meaning of section 11 of the judiciary act of 1789; and that in order to confer jurisdiction upon this court in such cases, it must appear by allegation in the declaration, or by proof, that the value of such land and premises, or of such estate, title, interest or right so claimed exceeds \$500.

Such not being made to appear in this case, there is no jurisdiction of the subject-matter of the suit in this court. The suit must, therefore, be dismissed, with costs to the defendants.

CULVER v. COUNTY OF CRAWFORD.

(District Court for Arkansas, sitting as a Circuit Court: 4 Dillon, 239-242. 1877.)

Opinion by PARKER, J.

STATEMENT OF FACTS.—The complaint in this case contains four counts, each one being based upon a written promise of the county to pay a sum of money therein specified, such promise in writing being what is commonly called and known as county scrip, or a county warrant. The warrants sued on are set out in the several counts *in hæc verba*. From these warrants, so set out and made a part of the complaint, it appears that the whole amount which the plaintiffs could recover would be less than \$500. The plaintiffs pray judgment for \$600. The defendant files a motion to dismiss the suit, for the reason "that it appears upon the face of the complaint that the sum in controversy does not exceed the sum or value of \$500."

§ 1671. *In ascertaining the amount in dispute with reference to jurisdiction, the court will look to the amount stated in the body of the complaint, not to the prayer.*

The plaintiff claims in argument that the jurisdiction of the United States circuit court, as to the subject-matter of the suit, is fixed by the amount claimed in the prayer of the complaint. Section 1 of the act of the 3d of March, 1875, provides "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500;" and, of course, when the action is between certain parties therein named. The question presented in this case is: How is the sum or matter in dispute to be ascertained?—by going to the whole complaint, or to the prayer alone? The sum or matter in dispute must exceed, exclusive of costs, the sum of \$500. There are no very recent decisions bearing directly upon the point in controversy in this case. We find, however, that the law regulating the removal of causes from state courts to federal courts has a provision in regard to the amount in controversy, in the precise language of the one set out above. Judge Dillon, in his "Removal of Causes from State Courts to Federal Courts," while treating of the law in regard to removal of causes, page 24, says: "The value of the matter in dispute for the purposes of removal is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint. In actions on a money demand, the value in dispute is the debt and damages claimed, as stated in the petition or declaration, and in the prayer for judgment. For example, if the action be on a note for a fixed sum, and the principal and interest and damages do not altogether exceed \$500, it is not removable, although the prayer for judgment may be for an amount greater than \$500." The prayer for relief is generally regarded as forming no part of the cause of action, and as having no effect

upon it, and as furnishing no test or criterion by which its nature may be determined. Pomeroy, Remedies and Remedial Rights, p. 630, sec. 580.

This is either true or false. If it is true, a court of limited jurisdiction must go to the statement of the cause of action contained in material parts of the complaint or declaration, in a case where a suit is upon a money demand or fixed amount. If it is not true, then the prayer is bad, because it is inconsistent with the other parts of the complaint or declaration. If it is bad, it is surely a very uncertain test from which to ascertain jurisdiction. Of course, in a suit for unascertained damages, the only test of the amount in dispute is found in the prayer for relief. But, under the rules of pleading, the plaintiff, when he sues upon a money demand, if it be on a written promise to pay, or an account, must at least set out the substance of his written promise or his account in his complaint, and must make such written promise or account a part of his pleading. Then, in that case, there is no trouble in ascertaining the true amount in controversy, by looking at the body of the complaint. In the case of *Judson v. Macon County*, 2 Dill., 213 (§ 1673, *infra*), the same being a suit upon coupons of a county, Judge Dillon evidently went to the whole complaint to ascertain the total amount in controversy. It is true that the jurisdiction is not to be determined by the amount of the judgment recovered. By matter in dispute is meant the subject of litigation—the matter for which the suit is brought and on which issue is joined. In an action on a money demand, the matter in dispute is the debt claimed; and its amount as stated in the body of the complaint, and not merely the damages alleged in the prayer for judgment at its conclusion, must be considered in determining the question whether the court can take jurisdiction.

In the section of the law regulating the appellate jurisdiction of the supreme court of the United States, it is provided that the matter in dispute shall exceed the sum of (now) \$5,000. Upon a statute similar to this, it was held by the supreme court, in *Lee v. Watson*, 1 Wall., 337 (APPEALS, § 544), that “the matter in dispute, in an action upon a money demand, is the debt claimed and its amount as stated in the body of the declaration, and not merely the damages alleged in the statement, in the prayer for judgment at its conclusion.” The same rule is found in Abbott’s United States Practice, vol. 1, p. 336; Phillips’ Practice, p. 78; Conkling’s Treatise, p. 132. In this case, the amount is a sum certain fixed by contract, which the plaintiff is obliged to set forth, and from which it may be seen that the sum sued for is less than the requisite sum to give this court jurisdiction. In such a case the court, in determining a matter of so much importance as its jurisdiction, must look to the whole complaint, and not to the prayer alone.

§ 1672. *Where the amount is not fixed, jurisdiction is determined by the amount claimed.*

In a suit to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum.

Motion sustained.

JUDSON v. MACON COUNTY.

(Circuit Court for Missouri: 2 Dillon, 213-215. 1873.)

STATEMENT OF FACTS.—Action on eleven coupons, of \$50 each, set forth in eleven counts. In conclusion the plaintiff stated his demand at \$550, for which

sum, with interest, he asked judgment. Demurrer on the ground that the amount was below the jurisdiction of the court.

Opinion by DILLON, J.

As to the *amount* necessary to give this court jurisdiction in cases like the present, the provision of the judiciary act (section 11) is that "The matter in dispute, exclusive of costs, must exceed the sum or value of \$500." As it is clear that all of the coupons are properly suable in the same action, and as the aggregate amount of these coupons exceeds \$500, it would seem quite obvious that the objection taken to the jurisdiction is not tenable. The argument urged to support the objection is this: By the act of congress of June 1, 1872 (17 Stats. at Large, 197, sec. 5), the "mode of proceedings" in this court is required to be conformed, as nearly as practicable, to the practice of the state court, and by the statute of the state, while several causes of action on contract may be united in the same petition, yet "Each cause of action must be separately stated with the relief sought for each." Wagner's Stats., 1012, sec. 2.

§ 1673. *The circuit court has jurisdiction in a suit for five hundred and fifty dollars, the declaration being in eleven different counts for fifty dollars each.*

It is contended, under this statute, that as each coupon is a separate cause of action, and must, as such, be separately stated, and that as each coupon is below \$500, and as under the practice in the state court, settled by the decisions of the supreme court, there must be a separate finding as to each cause of action (36 Mo., 110; id., 215), the matter in dispute is the amount of each coupon, and no more. The premises do not warrant the deduction sought to be drawn from them. The act of June 1, 1872, does not affect or modify the eleventh section of the judiciary act respecting the amount necessary to give this court jurisdiction; and since it is admitted that suit upon all the coupons was properly brought, and as the amount claimed upon all exceeds \$500, it is plain to a demonstration that the matter in controversy is the amount claimed upon all, and not upon any one coupon. The demurrer to the petition is overruled.

KREKEL, J., concurs.

MURPHY v. HOWARD.

(Superior Court of the Territory of Arkansas: Hempstead, 205, 206. 1833.)

Opinion by the COURT.

STATEMENT OF FACTS.—Howard declared in an action of *assumpsit* against Murphy, for the value of a certain keelboat, charged to be of the value of \$150, and laid his damages at that amount. Upon the trial of the issue joined, the jury by their verdict assessed the damages to \$25, for which the court rendered judgment for Howard, from which Murphy has appealed to this court.

The only ground relied upon by the counsel for the appellant for reversing the judgment is, that the circuit court did not possess jurisdiction of the case. By referring to the statute of 1828 (Acts, p. 34), it will be seen that the circuit courts are clothed with "original jurisdiction in all cases of \$100 and upwards." Is this a case of \$100, or is it a case where the amount in controversy is less? To decide this question we must look either to the declaration or the verdict of the jury. By referring to the former, it will be seen that the amount in controversy is \$150, the damages claimed for a breach of the contract. According to the latter, the amount in controversy was \$25, the damages assessed

by the jury in their verdict. To which of these shall we refer in deciding the question now presented to the court?

§ 1674. *The damages sued for determine the jurisdiction.*

The doctrine is well settled that in actions sounding in damages, those laid in the declaration, and not those found by the jury, are the cause of action, and give to the court jurisdiction. 2 Dallas, 328; 3 id., 441; 1 Bibb, 345. In these cases the doctrine is expressly laid down that the damages in the declaration furnish the rule to ascertain the jurisdiction of the court. "The absurd and inconvenient consequences that would result from a contrary doctrine afford a strong argument against its propriety. If a verdict for less than \$100 would oust the court of its jurisdiction, then it would seem to follow that a verdict for the defendant would equally deprive the court of its jurisdiction, and that no judgment could be given that would bar a future action for the same cause, or that would award to the defendant his costs. In actions sounding in damages, if the verdict is to be the criterion of jurisdiction, in many cases it will be impossible for a plaintiff to know to what tribunal to apply for relief. If he estimates his cause of action either too high or too low, it will be equally fatal. But further, taking the verdict as the rule to ascertain the jurisdiction, and it may be easily conceived that cases may occur in which, from a difference of opinion in the amount of damages between the jury and the justice of the peace, neither tribunal will exercise jurisdiction and the party will be without a remedy. A doctrine resulting in such consequences cannot be correct." Singleton v. Madison, 1 Bibb, 342.

Judgment affirmed.

§ 1675. **Amount of damages alleged.**—In actions of tort, brought in the circuit court of the United States, the test of jurisdiction, as regards the value of the matter in controversy, is the amount of damages laid in the declaration. If this exceeds \$500, the court has jurisdiction. Hulsecamp v. Teel, 2 Dal., 358.

§ 1676. In an action sounding in damages, brought in the state court and removed to a federal court, the damages laid determine the question of jurisdiction as to amount. Muns v. Dupont, 2 Wash., 463; Martin v. Taylor,* 1 Wash., 2.

§ 1677. Where the jurisdiction of the court depends on the pecuniary amount in dispute, the damages alleged in the declaration give the test of jurisdiction. Sherman v. Clark, 3 McL., 91.

§ 1678. — **penalty of less amount.**—Where an agreement under seal contains a penalty of less than \$500, the circuit court has jurisdiction of an action of covenant for damages in excess of \$500. Martin v. Taylor,* 1 Wash., 2.

§ 1679. **Amount claimed — Recovery of less sum in state court.**—The jurisdiction of federal courts, so far as dependent on the amount in controversy, is decided by the amount claimed in the declaration, whether the suit is begun in the federal court or removed there from a state court; and although the plaintiff may have recovered in the state court a less sum than gives jurisdiction to the federal court. Gordon v. Longest, 16 Pet., 103.

§ 1680. — **subsequent change in condition of parties.**—The words "matter in dispute," used in the twelfth section of the judiciary act, as fixing the pecuniary limits to the jurisdiction, mean the amount claimed by the plaintiff in his declaration or statement of his case. When the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties will oust it. Kanouse v. Martin, 15 How., 207.

§ 1681. **Amount of demand — Offset — Account in bar.**—If the amount of a plaintiff's demand is large enough to support the jurisdiction of the federal circuit court, the fact that offsets reduce the sum below the jurisdictional limit will not deprive the court of jurisdiction. McKnight v. Ramsay, 1 Cr. C. C., 40. But *aliter* if so reduced by an account in bar. Beale v. Voss, id., 179.

§ 1682. **Amount stated in petition for removal.**—When the summons in a civil suit in a state court states the sum demanded to be \$330.25 and interest, and a petition filed by the defendant for removal of the cause to the circuit court of the United States states the amount in dispute to be over \$500, the record shows facts enough to confer jurisdiction, and a declara-

§§ 1683-1694. COURTS.—JURISDICTION OF THE CIRCUIT COURT.

tion filed in the federal court which shows the demand to be less than \$500 will not divest the jurisdiction. *Roberts v. Nelson*, 8 Blatch., 75.

§ 1683. **Part of claim dropped after removal from state court.**—If a plaintiff in a state court inserts in his case a claim which he cannot support, and the case is afterwards removed by the defendant to the United States circuit court, by reason of the citizenship of the parties, the fact that, if the unsupported claim is dropped, the matter in dispute is less than \$500, does not oust the jurisdiction of the court, if the original claim was more than \$500. *Ibid.*

§ 1684. **Amount to be gained or lost by the suit.**—In order to give jurisdiction to the circuit court, so far as regards the amount in dispute, it must appear that the plaintiff is likely to gain or lose by the suit an amount exceeding \$500. Hence this requirement is not satisfied in a suit to enjoin the collection of a tax, by an allegation that the tax in question is to be raised for the payment of a coupon on a bond for \$300,000, unless it appear that the plaintiff is so large an owner of taxable property that he will be affected to an amount exceeding \$500. *Adams v. Douglas County*,* *McCahon*, 235.

§ 1685. **Evidence — Verdict.**—When the jurisdiction of the circuit court depends on the value in controversy, if evidence is given at the trial to show the value sufficient to support the jurisdiction, the jurisdiction will be maintained although the jury do not find that fact. *Hartshorn v. Wright*, Pet. C. C., 72.

§ 1686. **Writ of right — Costs.**—Under the eleventh and twentieth sections of the judiciary act of 1789, chapter 20, it is clear that the circuit court of the United States has jurisdiction of writs of right where the property demanded exceeds \$500 in value. If the demandant recovers less he may be adjudged to pay costs in the discretion of the court. *Green v. Lister*, 8 Cr., 242.

§ 1687. **Action not requiring amount to be stated.**—In a suit in a federal court, where the jurisdiction depends on the value of the thing in controversy and the demand is not for money, and the nature of the action does not require the value to be stated in the declaration, the practice of the federal courts is to allow evidence of value to be given. *Ex parte Bradstreet*, 7 Pet., 647.

§ 1688. **Bond with penalty.**—If a suit is brought on a bond with a penalty of \$1,000, and no breach is laid nor any sum found due by the jury, the case will not be dismissed because the subject in dispute is under \$50. *Postmaster-General v. Cross*, 4 Wash., 327.

9. Locality.

SUMMARY — *Trespass to lands beyond district*, § 1689.—*Tort in one state resulting in damage in another*, § 1690.—*Several districts in one state*, § 1691.—*Suit for internal revenue tax; where to be brought*, § 1692.—*Suit where neither party resides*, § 1693.—*Effect of redistricting on pending cases*, § 1694.

§ 1689. A federal court cannot take cognizance of an action for trespass to lands lying without its district, though the trespasser be a resident of, and be found within, the district. *Livingston v. Jefferson*, §§ 1695-98.

§ 1690. The circuit court for Connecticut has jurisdiction of a suit for the wrongful diversion of a water-course in that state, resulting in damage to plaintiff's mill in Massachusetts. *Foot v. Edwards*, §§ 1699-1701.

§ 1691. Under section 740, Revised Statutes, where there are several districts in one state, defendants must be sued, except in suits of a local nature, in the districts wherein they reside. *Seidenbach v. Hollowell*, § 1702.

§ 1692. Under Revised Statutes, section 733, a suit for the collection of an internal revenue tax will not lie in any district other than that in which the tax accrues or the delinquent resides. Hence the circuit court for New York has no jurisdiction of such a suit brought by the United States against a Connecticut corporation for a tax accruing in Connecticut, though defendant was duly found and served in New York. *United States v. Railroad Co.*, § 1703.

§ 1693. Since the act of March 3, 1875, it is not material to the question of jurisdiction of the circuit court that neither party is a citizen of the state where suit is brought. It is sufficient that they are citizens of different states, and that defendant was found within the district. *Brooks v. Bailey*, § 1704.

§ 1694. Where a county in the western district of Arkansas was, pending a suit against it, transferred to the eastern district, the jurisdiction of the circuit court for the western district over the cause was not affected. *Culver v. Woodruff County*, §§ 1705, 1706.

[NOTES.— See §§ 1707-1718.]

LIVINGSTON v. JEFFERSON.

(Circuit Court for Virginia: 1 Marshall, 203-212; 4 Hughes, 606-616. 1811.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The sole question in this case is, Can this court take cognizance of a trespass committed on lands lying within the United States and without the commonwealth of Virginia, in a case where the trespasser is a resident of, and is found within, the district? I concur with my brother judge in the opinion that it cannot. I regret that the inconvenience to which delay might expose at least one of the parties, together with the situation of the court, will not admit of my bestowing on this question that deliberate consideration which the very able discussion it has received at the bar would seem to require; but I have purposely avoided any investigation of the subject previous to the argument, and must now content myself with a brief statement of the opinion I have formed, and a sketch of the course of reasoning which has led to it.

§ 1695. *History of the doctrine of actions, local and transitory.*

This doctrine of actions, local and transitory, has been traced up to its origin in the common law, and, as has been truly stated on both sides, it appears that originally all actions were local; that is, that, according to the principles of the common law, every fact must be tried by a jury of the vicinage. The plain consequence of this principle was that those courts only could take jurisdiction of a case who were capable of directing such a jury as must try the material facts on which their judgment would depend. The jurisdiction of the courts, therefore, necessarily became local with respect to every species of action.

But the superior courts of England having power to direct a jury to every part of the kingdom, their jurisdiction could be restrained by this principle only to cases arising on transactions which occurred within the realm. Being able to direct a jury either to Surrey or Middlesex, the necessity of averring in the declaration that the cause of action arose either in Surrey or Middlesex could not be produced in order to give the court jurisdiction, but to furnish a venue. For the purpose of jurisdiction it would unquestionably be sufficient to aver that the transaction out of which the cause of action arose occurred within the realm. This, however, being not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, for the promotion of the ends of justice, according to the circumstances of the nation, the necessity of the times and the general state of things, was thought susceptible of modification, and judges have modified it. They have not changed the old principle as to form. It is still necessary to give a venue, and where the contract exhibits on its face evidence of the place where it was made, the party is allowed to aver that such place is in any county in England.

This is known to be a fiction. Like an ejectment, it is the creature of the courts, and is moulded to the purposes of justice, according to the views which its inventors have taken of its capacity to effect those purposes. It is not, however, of undefinable extent. It has not absolutely prostrated all distinctions of place, but has certain limits prescribed to it, founded in reasoning, satisfactory to those who have gradually fixed those limits. It may well be doubted whether, at this day, they might be changed by a judge not perfectly satisfied with their extent. This fiction is so far protected by its inventors that the averment is not traversable for the purpose of defeating an action it was in-

vented to sustain, but it is traversable whenever such traverse may be essential to the merits of the cause. It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

§ 1696. *Courts cannot take cognizance of actions for trespass to lands lying beyond the limits reached by their process.*

In the case at bar it is traversed for that purpose; and the question is whether this is a case in which such traverse is sustainable, or, in other words, whether the courts have so far extended their fiction as, by its aid, to take cognizance of actions of trespass on lands not lying within those limits which bound their process. They have, without legislative aid, applied this fiction to all personal torts, wherever the wrong may have been committed, and to all contracts, wherever executed. To this general rule contracts respecting lands form no exception. It is admitted that, on a contract respecting lands, an action is sustainable wherever the defendant may be found. Yet in such a case every difficulty may occur that presents itself in an action of trespass. An investigation of title may become necessary, a question of boundary may arise, and a survey may be essential to the full merits of the cause. Yet these difficulties have not prevailed against the jurisdiction of the court. They are counter-vailed, and more than counter-vailed, by the opposing consideration that if the action be disallowed the injured party may have a clear right without a remedy, in a case where a person who has done the wrong, and who ought to make the compensation, is within the power of the court.

That this consideration should lose its influence where the action pursues a thing not in the reach of the court is of inevitable necessity; but for the loss of its influence where the remedy is against the person, and is within the power of the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment. If, however, this technical reason is firmly established, if all other judges respect it, I cannot venture to disregard it. The distinction taken is, that actions are deemed transitory, where the transactions on which they are founded might have taken place anywhere; but are local where their cause is in its nature necessarily local. If this distinction is established; if judges have determined to carry their innovation on the old rule no further; if, under circumstances which have not changed, they have determined this to be the limit of their fiction, for a long course of time, it would require a hardihood which, sitting in this place, I cannot venture on to pass this limit.

§ 1697. *Authorities reviewed.*

This distinction has been repeatedly taken in the books and is recognized by the best elementary writers, especially by Judge Blackstone, from whose authority no man will lightly dissent. 3 Blackstone's Commentaries, 294. See, also, Mr. Chitty's note (4) in his edition of Blackstone, vol. ii, 233. He expressly classes an action of trespass on lands with those actions which demand their possession and which are local; and makes those actions only transitory that are brought on occurrences which might happen anywhere. From the cases that support this distinction, no exception, I believe, is to be found among those that have been decided in court on solemn argument. One of the greatest judges who ever sat upon any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction between taking jurisdiction in cases of contracts respecting lands, and of torts com-

mitted on the same lands, that he attempted to abolish it. In the case of *Mostyn v. Fabrigas*, 1 Cowp., 161, Lord Mansfield stated the true distinction to be between proceedings which are *in rem*, in which the effect of the judgment cannot be had unless the thing lay within the reach of the court, and proceedings against the person where damages only are demanded. But this opinion was given in an action for a personal wrong which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled, had this distinction been laid down in an action deemed local, and may be termed an *obiter dictum*. He recites, in that opinion, two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of his Britannic majesty. But both those decisions were at *nisi prius*, and though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction of the court. In a subsequent case reported in 4th Durnford and East, p. 503 (*Doulson v. Matthews*, 1792), these decisions are expressly referred to and overruled, and the old distinction is affirmed.

It has been said that the decisions of British courts made since the Revolution are not authority in this country. I admit it. But they are entitled to that respect which is due to the opinions of wise men, who have maturely studied the subject they decide. Had the regular course of decisions, previous to the Revolution, been against the distinction now asserted, and had the old rule been overthrown by adjudications made subsequent to that event, this court might have felt itself bound to disregard them; but where the distinction is of ancient date, has been long preserved, and a modern attempt to overrule it has itself been overruled since the Revolution, I can consider the last adjudication in no other light than as the true declaration of the ancient rule. According to the common law of England, then, the distinction taken by the defendants between actions local and transitory is the true distinction, and the action of trespass *quare clausum fregit* is a local action.

This common law has been adopted by the legislature of Virginia. Had it not been adopted I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation, and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking off our political connection with the parent state we did not break off our connection with each other. It remained subject to the ancient rules until those rules should be altered by the competent authority.

§ 1698. *Jurisdiction of federal courts depends exclusively upon the laws and constitution of the United States.*

But it has been said that this rule of the common law is impliedly changed by the act of assembly which directs that a jury shall be summoned from the by-standers. Were I to discuss the effects of this act in the courts of the state, the inquiry whether the fiction already noticed was not equivalent to it in giving jurisdiction would present itself. There are, also, other regulations, as that the jurors should be citizens, which would deserve to be taken into view. But I postpone these considerations, because I am decidedly of opinion that the jurisdiction of the courts of the United States depends exclusively on the constitution and laws of the United States. In considering the jurisdiction of the circuit courts, as defined in the judicial act and in the constitution, which that

act carries into execution, it is worthy of observation that the jurisdiction of the court depends on the character of the parties, and that only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be executed in order to give it the right to try the cause, and, consequently, the same defect of justice might occur. Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction which produces the inconvenience of a clear right without a remedy. I must submit to it. The law, upon the demurrer, is in favor of the defendant.

FOOT v. EDWARDS.

(Circuit Court for Connecticut: 3 Blatchford, 310-316. 1855.)

Opinion by INGERSOLL, J.

STATEMENT OF FACTS.—It appears, by the plaintiffs' declaration, that they are the owners of mill property in the state of Massachusetts, situate not far from the dividing line between that state and the state of Connecticut, on a stream of water which is accustomed to flow from, and has its rise in, the latter state; that, in Connecticut, the defendant diverted the water of the stream, by which diversion it ceased to flow to the plaintiffs' mill; and that, in consequence thereof, the value of the plaintiffs' mill, so situate in Massachusetts, was greatly impaired. The right of recovery depends upon establishing three facts. These three facts are: the right of the plaintiffs to have the water of the stream flow to their mill; the diversion of that water by the defendant; and damage to the plaintiffs' mill in consequence of such diversion. The plaintiffs' mill was in Massachusetts. Their right to have the water of the river flow to it was in that state. They have been deprived of that right by the act of the defendant. The damage which they have sustained was to their mill in Massachusetts. But the act committed by the defendant, by which the plaintiffs have been deprived of that right, and by which their mill in Massachusetts has been damaged, was committed by the defendant in Connecticut; and that act was the diversion in Connecticut, above the plaintiffs' mill, of the water of the stream on which that mill stood. For this damage, from such a cause, it is insisted by the defendant that no remedy can be had in this court, and that no court can afford any remedy except a court in Massachusetts.

The defendant claims that, as the damage which the plaintiffs seek to recover was to their real estate situate in Massachusetts, no court can give them redress therefor, except a state court in the county, or a federal court in the state and district, where the real estate is situate. If this claim is well founded, the plaintiffs may have no redress for the injury complained of, as, when the wrong act complained of, which produced the injury, was committed, the defendant was in Connecticut, and he may never be in Massachusetts to be served with process.

§ 1699. *Venue of actions for tortious diversion of a water-course.*

The rule is well settled that an action on the case for diverting a water-course must be tried, if the cause is brought before a state court, in the county where the cause of action arose. *Watts v. Kinney*, 23 Wend., 485; S. C., 6 Hill, 82.

If the action is brought in the federal court, it must be tried in the state and district where the cause of action arose. Usually, in actions brought to recover damages to real estate by the diversion of a stream of water, the act which causes the injury is committed in the county where the real estate damaged is situated. In such a case it is very clear, where the action is brought before a state court, that there is only one county where the suit can be maintained; and that county is the county in which the land is situated which received the injury, and in which the act which produced it was committed. In such a case it is very clear, also, that the cause of action arose entirely in the county where the land is situate, and that no court out of such county can take jurisdiction of the case. Where land situated in one district is injured by a tortious act committed in the same district, it is very clear that the action for the recovery of the damage to such land, if brought before a federal court, must be brought before the court of the district in which the land is situate, and in which the act which caused the damage was committed. In such a case the cause of action arose entirely in the district where the land is situate, and no federal court of any other district can take jurisdiction of the action. *Livingston v. Jefferson*, 1 Marsh., 203, 208 (§§ 1695-98, *supra*). If real estate situate in one county is injured by the diverting of a stream of water in another county, and the suit is brought before a state court, such suit is properly brought, if brought in a court in the county where such real estate is situate. *Thompson v. Crocker*, 9 Pick., 59; *Barden v. Crocker*, 10 Pick., 383. If a mill situate in one state is injured by the diversion, in another state, of the stream upon which it is situate, and a suit for such diversion should be brought before the federal court in the state where the mill is situate, such suit would be properly brought, and such court would have jurisdiction of the case. Per Woodbury, J., in *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M., 539. But it is denied by the defendant that a state court in the county where the diversion took place, the land injured not being in such county, or that a federal court in the state where the diversion took place, the land injured not being in such state, can take jurisdiction of such a case.

§ 1700. *Where diversion took place in one state and consequent injury in another, the circuit court of the former state has jurisdiction.* (See ACTIONS, § 31.)

It being well settled that, in a case of this kind, the suit must be brought where the cause of action arose, it becomes essential, in order to determine whether this suit has been brought before the proper court, to determine what is the cause of action. An action is "the lawful demand of one's right." The cause of this lawful demand, or the reason why the plaintiff can make such demand, is some wrong act committed by the defendant, and some damage sustained by the plaintiff in consequence thereof. The commission or omission of an act by the defendant, and damage to the plaintiff in consequence thereof, must unite to give him a good cause of action. No one of these facts by itself is a cause of action against the defendant. The wrongful diversion, then, of the water of the stream, in Connecticut, by the defendant, and the consequent damage which the plaintiffs' mill in Massachusetts has sustained, constitute the cause of action. A part of that which is essential to the plaintiffs' right to recover took place in Connecticut. Without the commission of the act of diversion in Connecticut, there would have been no good cause of action. With it, there is a sufficient cause of action. The act of diversion, which arose in Connecticut, and the other facts existing, give to the plaintiffs a cause of action. That which is essential, therefore, to the plaintiffs' right of recov-

ery against any one, or their cause of action, arose where the suit has been brought.

§ 1701. *Authorities reviewed.*

This conclusion from the principle stated would be quite satisfactory without the authority of adjudged cases to support it. Where two material facts are necessary to give a good cause of action, and they take place in different counties, the cause of action may be said to arise in either county. Various authorities state the rule as follows: "When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other." Com. Dig., Action, N., 11. "Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either." 1 Saunders' Pl. & Ev., 413. In the case of *Scott v. Brest*, 2 Term R., 238, Ashurst, J., in speaking on this subject, says: "Supposing the foundation of the action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute the offense, the plaintiff may, *ex necessitate*, lay the venue in either." In *Bulwer's Case*, 7 Coke, 1, it is thus laid down: "When matter in one county is depending upon the matter in the other county, there the plaintiff may choose in which county he will bring his action;" and: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage." In this case the default was in Connecticut.

In the case of *Thompson v. Crocker*, 9 Pick., 59, which was an action brought in the county of Plymouth, to recover damages to mills situate in that county, caused by the diversion of water in the county of Bristol, Judge Parker, upon exceptions taken to the jurisdiction, remarked, in giving the opinion of the court in favor of the jurisdiction: "The place where the injury was done, to wit, at the mills, gives the locality to the action, and not the source from which the mischief came." But, in the case of *Barden v. Crocker*, 10 Pick., 383, which was a case of the like kind, where the damage was in one county, and the diversion which caused it was in another, and where the action was brought in the county where the property was damaged, the court repudiated the limited doctrine on the subject of jurisdiction, laid down by Judge Parker in *Thompson v. Crocker*, and expressed the opinion that the action could be maintained in either county. This subject was discussed in the case of *Stillman v. The White Rock Mfg. Co.*, 3 Woodb. & M., 539. The plaintiff in that case was the owner of a mill in Connecticut, on the stream of water which is the dividing line between Connecticut and Rhode Island. The defendant on the opposite side of the stream, in Rhode Island, dug a trench, by which the water of the stream was diverted from the plaintiff's mill. The plaintiff brought his bill of complaint, in the circuit court in Rhode Island, to restrain the defendant from thus diverting the water of the stream. The injunction was granted. Judge Woodbury decided that case upon a principle not involved in this one. But, in giving his opinion, he says: "If this view" (the view which he took) "of the rights of the parties were not shown to be entirely sound, it might be reasonable, in a case like this, to hold a wrong-doer liable, either where the direct act is done or where the consequential injury is felt." And the cases which he puts clearly show that he so considered the law to be.

The doctrine contended for by the defendant is, that where the plaintiff has

been damaged in his real estate, and in that only, the suit must be brought where the real estate is situated. A plaintiff may suffer damage to his real estate by various wrong acts committed by a defendant. In this case, the wrong act complained of is the diversion of the water of the stream. A plaintiff may suffer damage to his real estate by a slander of his title. And if, in this case, a court in Connecticut, where the wrong act was committed, has no right to give redress to the plaintiffs for the injury which their real estate in Massachusetts has sustained, in consequence of such wrong act, then, if the plaintiffs had owned a dwelling-house in Massachusetts, which they were accustomed to rent, and the defendant, in Connecticut, had published a malicious libel in regard to such dwelling-house, in consequence of which it had been greatly impaired in value, the plaintiffs would have no redress for such injury in Connecticut, where the publication of the libel was made, and would be without redress, unless they could find the defendant in Massachusetts, so that he could be served with process.

With this view of the case this court has jurisdiction, and the plaintiffs' declaration must be adjudged to be sufficient.

SEIDENBACH v. HOLLOWELL.

(Circuit Court for Arkansas: 5 Dillon, 382-384. 1879.)

STATEMENT OF FACTS.—Plaintiffs, citizens of Ohio, sued defendants in the circuit court for the eastern district of Arkansas. Watt, who had sold his interest in the property to his co-defendant, made no defense, and judgment by default went against him. The other defendant answered that both defendants were inhabitants of the western district, and moved to discharge an attachment directed to the marshal of the western district.

Opinion by DILLON, J.

The state of Arkansas contains two districts. This suit is not of a local nature. The defendants are both residents of the western district. They had been partners, and the firm had been dissolved, and the defendant Hollowell had purchased all of the interest of his co-defendant Watt in goods attached. These goods were in the western district. It is undisputed that Hollowell resided in that district. It is claimed by the plaintiffs that Watt had lost his residence therein. The proof does *not* establish this. But if this were so, the proof shows that he did not reside in the eastern district.

§ 1702. *Defendants must be sued in the district where they reside.*

Under these circumstances the defendant Hollowell must be sued in the district in which he resides. Such is the true construction of section 740 of the Revised Statutes. It is immaterial that the service of the summons was made on both defendants in the eastern district. It is not necessary to consider the effect of the default of Watt. He was not the owner of the property attached. Hollowell never submitted to the jurisdiction of the court. The present motion is to discharge the property attached. That motion must be sustained on the ground that there was no authority of law to send the writ of attachment into the western district. State regulations as to where the writ of attachment may run do not apply. Hollowell alone could move to discharge the property attached under the writ, and his right to this relief is not weakened by his co-defendant joining in the motion. Such was the opinion of the district judge, and such is also the opinion of Mr. Justice Miller, to whom the records and the briefs have been submitted, as well as my own.

Motion sustained.

UNITED STATES *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

(District Court, Southern District of New York: 10 Benedict, 144-150. 1878.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a suit brought to recover a tax alleged to have accrued against the defendant, a railroad corporation, in the year 1864, under the act of June 30, 1864. 13 Stat. at Large, p. 275. The defendant pleads to the jurisdiction that the tax, if any is due, accrued in the district of Connecticut, and that the defendant is not a New York corporation, but incorporated under the laws of Connecticut, and not a resident of this district. To this plea the plaintiff demurs.

The question raised is whether a suit for this tax can be brought in a district other than that where the defendant resides or where the tax accrues, or whether it can also be brought in the district where the defendant shall be personally served. It is conceded by the learned counsel for the defendant that under the judiciary act of 1789, chapter 20, section 11 (R. S., § 739), which prohibits the bringing of a civil suit against an inhabitant of the United States "in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ," a corporation may be sued out of its domicile, if found in another district; and the defendant does not contend that this defendant was not "found" within this district within the meaning of that section. The claim of the defendant is that by Revised Statutes, section 733, the plaintiff is restricted to the district where the tax accrues and the district where the defendant resides for the purpose of this action. That section is as follows: "Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs, or in the district where the delinquent resides." In the absence of any statute regulation as to the courts where such a suit is to be brought, no doubt the United States could sue in any district where the defendant could be found. And it is argued on behalf of the plaintiff, that the language of section 733 is permissive merely, and not restrictive, the words being "*may be sued for*," etc., and that the section adds another district in which the suit may be brought, namely, that in which the tax accrues, to those in which under the general terms of section 739 it could otherwise alone be brought, namely, those in which the defendant resides or can be found. Section 733 is a re-enactment of part of the forty-first section of the act of June 30, 1864 (13 Stat. at Large, p. 239), as amended by the ninth section of the act of July 13, 1866 (14 Stat. at Large, p. 111).

§ 1703. *Under R. S., sec. 733, a suit will not lie to recover a tax in a district other than that in which the tax accrues or the defendant resides.*

The act of 1864, chapter 173, section 41, provided as follows: "That it shall be the duty of the collectors aforesaid or their deputies, in their respective districts, and they are hereby authorized, to collect all the duties and taxes imposed by this act, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by virtue of this act; and all fines, penalties and forfeitures which may be incurred or imposed by virtue of this act shall be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, *qui tam*, or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction." It will be observed that

under this statute no special provision was made as to the district in which suits for taxes should be brought; such suits were therefore liable to be brought and could be only brought in the district where the defendant resided or in the district where he was found, while suits for fines might be brought in the district where the fine was incurred, and also "in any other court of competent jurisdiction," which included certainly a circuit or district court of the United States for the district where the offender might be found. Section 41 of the act of 1864 was amended by the act of 1866 so as to read as follows (p. 111): "That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized, to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties and forfeitures which may be incurred or imposed by law shall be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction. And taxes may be sued for and recovered in the name of the United States in any proper form of action before any circuit or district court of the United States for the district within which the liability to such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action." A provision as to suits for fines, penalties and forfeitures, differing only in some unimportant respects, was also made by the one hundred and seventy-ninth section of the act of 1864 (13 Stat. at Large, p. 305), in connection with a provision imposing on collectors the duty of collecting such fines, etc. And this also was verbally amended by the act of 1866 (14 Stat. at Large, p. 145), but not in any particular varying its terms in respect to the courts having jurisdiction of suits and proceedings therefor.

A comparison of these two statutes shows, I think, that the purpose of amending the statute was to restrict the plaintiff in a suit for taxes to the two districts — that in which the tax accrues and that in which the defendant resides. Some change in the mode of collecting fines or taxes was intended by this amendment. In the original act the collectors are required to collect taxes, but no court was specified to which they are to resort. In the amending act, fines are still to be sued for in the circuit or district court of the United States for the district where the fine is incurred, or in any other court of competent jurisdiction, the same as before. The change made is by adding the provision as to taxes, that suits may be brought in the district where the liability for the taxes is incurred *or in the district where the defendant resides*. Now if the purpose of this amendment had been merely to allow the United States to sue for a tax in the district where the liability was incurred, that purpose would have been well expressed by simply providing that the suit *may* be brought in that district. The language being in form permissive only, the United States would seem not, by that language, to be restricted from suing in any other district in which, by the existing law, it could already sue, namely, the district where the defendant resides or the district where he may be found; and if it was the purpose of this language, as claimed on the part of the United States, to confer a new right as to the place of suit, the words "or where the party, etc., resides," are wholly unnecessary and unmeaning. They are unnecessary because the right to sue thus conferred already existed; they are unmeaning be-

cause the existing alternative right to sue thus referred to, if it be supposed that it was intended to express by these words the existing alternative right, is only half expressed by the language used. The words are not apt nor broad enough to be supposed to have been used *ex majore cautela* to guard against the possible construction that the liberty to sue in the district where the tax accrues was intended to be exclusive, and the only place in which suit could be brought, and so that these added words were intended to save existing rights to sue. This is obviously not the intention, because the words used plainly express a distinct part and only a part of the existing right as to the place in which the suit may be brought, that right as then existing embracing, besides the district where defendant resides, the district also where he may be found. But words thus introduced into a statute, particularly by way of amendment, must be held to have been deliberately used and to have some force and meaning; and the only construction that can be put on these words, as it seems to me, to give them any sensible meaning or application, is that they are restrictive, limiting the right to sue to the district where the defendant resides, and the district where the tax accrues,—that they were intended to regulate the whole matter of the place of such suits. It seems impossible to give the words any proper force or to account for their being introduced into the statute on any other theory. Further support is given to this view by the juxtaposition of the two provisions, one as to fines, the other as to taxes. In the one the language used in the alternative to the new right given is “any other court of competent jurisdiction,” which includes the district where the offender can be found. Immediately follows the provision as to taxes. And different language is used for a similar alternative provision. It must be assumed that this difference of language was intended, and that the purpose had in view in using the expression employed as to suits for taxes would not have been affected by using the same language adopted as to fines. Such marked differences in language used for a similar purpose in the same act and the same section cannot be held to have been accidental.

Moreover, it may well have been thought that the privilege given to the government to sue for a tax in the district where the tax accrues, and in the district where the defendant resides, afforded ample and convenient means of collecting the tax, and that it was unnecessary to preserve the right to sue, also, in the district where the defendant may be found. There seems to be nothing unreasonable in this arrangement as to suits for taxes, while as to suits for fines, penalties and forfeitures it has been thought wise to preserve to the government all existing rights to sue, while specially granting the new right to sue where the fine, penalty or forfeiture was incurred.

These provisions of the act of 1866 were embodied in sections 732 and 733 of the Revised Statutes with a change of form, but hardly of substance, as to suits for fines. Section 732 provides that suits for fines, etc., may be brought in the district where they accrue or in the district where the offender is found. And by section 733, as above cited, suits for taxes may be brought in the district where the tax accrues, or in that where the defendant resides. Thus the revisers appear to have indicated their understanding that the distinction in the act of 1866 was an intended difference in the two cases, by preserving the same distinction of language in the revision. Certainly this re-enactment detracts nothing from the reasons in favor of holding that the words were used in a restrictive sense in the act of 1866. And the presumption is against any change being intended by the substantial re-enactment of

these two clauses taken from that section of the act of 1866, in these two sections of the Revised Statutes. Demurrer overruled and judgment for defendant.

BROOKS v. BAILEY.

(Circuit Court for Vermont: 9 Federal Reporter, 438, 439. 1881.)

Opinion by WHEELER, D. J.

STATEMENT OF FACTS.—This is a bill in equity in which the orator sets himself up as of Boston, in the state of Massachusetts, and a citizen of that state, and the defendant as of Stowe, in the state of Vermont, and a citizen of that state. The defendant has pleaded that at the time of the bringing of the bill he was, and now is, a citizen of the state of New Hampshire, and that neither he nor the orator then was or now is a citizen of the state of Vermont; and this plea has been argued. By the provisions of the constitution the judicial power of the United States was made to extend to controversies between citizens of different states. Article 3, § 2. By the judiciary act of 1789, congress conferred upon the circuit courts jurisdiction of all suits of a civil nature, at common law or in equity, of the required amount, between a citizen of the state where the suit is brought and a citizen of another state. Chapter 20, § 11; 1 St. at Large, 78. At the same time, it was provided that no civil suit should be brought therein against an inhabitant of the United States by original process in any other district than that whereof he should be an inhabitant, or wherein he should be found, at the time of serving the writ. *Id.*

§ 1704. *It is not material as to jurisdiction of what states parties may be citizens, so that they are citizens of different states.*

These provisions continued in force until the act of March 3, 1875. R. S., § 629; *id.*, § 739. The former was the law which conferred jurisdiction in this class of cases; the latter was a limitation upon the place where suits might be brought for the ease of defendants. Both were operative in determining where the place might be. *McMicken v. Webb*, 11 Pet., 25 (§§ 1196–98, *supra*). The act of March 3, 1875, extended the jurisdiction to all suits of a civil nature, at common law or in equity, of the required amount, in which there should be a controversy between citizens of different states, without limiting it to depend at all upon citizenship of either party in the state where the suit should be brought; but retained the limitation upon the bringing of suits in other districts than that whereof the defendant should be an inhabitant or in which he should be found. It has been argued that because this limitation is in substantially the same language in the act of 1875 that it was in the act of 1789, it must receive substantially the same construction that it had always borne. This would be correct if it were to be applied to the same jurisdiction otherwise conferred; but it is not. This provision in the act of 1789 was only to be applied in determining in which district of the two states, between whose citizens jurisdiction of suits was given, the suit must be brought. In the act of 1875 it is to be applied in determining in which district of all the states, between the citizens of any two of which jurisdiction of suits is given, the suit must be brought. Under the latter act this court, in common with other circuit courts, has jurisdiction of all suits, of the required amount, between citizens of different states among all the states, while under the former it had jurisdiction only of suits between citizens of this state and those of some other of all the states. The suit could be brought only in the district where the defendant resided or was found, under either. That this defendant was found in this district when

the process was served is not denied, and therefore the right to bring the suit in this district is not denied. Plea overruled. Defendant to answer over by January rule-day.

CULVER v. WOODRUFF COUNTY.

(Circuit Court for Arkansas: 5 Dillon, 392-394. 1878.)

STATEMENT OF FACTS.—Plaintiffs move to transfer this case to the eastern district for the reason that the county defendant has, by act of congress, pending the cause, been transferred to the eastern district.

§ 1705. *Jurisdiction having once attached is not ousted by a subsequent change in the condition or relation of the parties.*

Opinion by PARKER, J.

On the question raised by this motion the court holds the law to be that, when jurisdiction has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause will deprive the court of jurisdiction over the cause, or over any proceeding touching the execution of the judgment. It is clear that the jurisdiction depends on the state of things existing at the time the action is brought, and that after it is once vested it cannot be ousted by subsequent events. Now, if a suit is brought in this court by a non-citizen of the state against a citizen of the state and resident of the district, and the non-citizen afterwards becomes a citizen of the state pending the suit, or the resident of the district becomes a non-resident before the determination thereof, neither one of these changes in the *status* of the parties will divest the court of jurisdiction, because the same has attached, and the condition or relation of the parties at the time of bringing the suit is the test of jurisdiction.

The case of this county presents a case of a change of residence from this judicial district to another by operation of law since this suit was brought, and after jurisdiction had attached. This principle is directly decided in the case of *The United States v. Dawson*, 15 How., 467. This was a case that went to the supreme court of the United States from this district, or rather what had then just become the eastern district of this state. A new district had, in the year 1851, been created, called the western district of Arkansas, consisting of nine counties in the state and the Indian country, and a case was pending in the old district from the Indian country. It was claimed for the defendant that he could not be tried in the eastern district, but that his case must be sent to the other district. The court says: "We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it, in our judgment, necessarily operated to deprive them of it."

§ 1706. *A law changing a district does not work a removal of pending cases.*

The law was silent as to cases pending in the old district. Therefore, the effect of the decision is that, unless the law changing the district provides that pending cases shall be removed to the new district, the mere passage of the law does not work a removal. The point raised by the motion in this case is directly decided in the case of *Rhodes v. Selin*, 4 Wash., 725. The same question is inferentially decided in *Dunn v. Clarke*, 8 Pet., 1; *Mollan v. Torrance*, 9 Wheat., 537; *Morgan v. Morgan*, 2 Wheat., 290; *Hatfield v. Bushnell*, 1 Blatch., 393. The law in this case being silent as to cases pending in the dis-

strict court for the western district of Arkansas against counties which have been placed by its terms in the eastern district, and against persons living in these counties, they must be tried in that court whose jurisdiction had attached at the time of the passage of the law. Congress, of course, could have provided for a transfer of these cases. It has not done so. The mere passage of the law does not work a removal of the cases.

Motion overruled.

§ 1707. Ordering sale of property outside of district.—A circuit court of the United States has no jurisdiction to order the sale of land lying wholly outside its district, by a master in chancery acting under its authority. *Boyce v. Grundy*, 9 Pet., 289.

§ 1708. A court having jurisdiction of the case may order the trustees of a railroad to sell the entire road, although a large part of it lies outside the local jurisdiction of the court. *Wilmer v. Atlanta & Rich. Air Line R. Co.*, 2 Woods, 455 (CONV., §§ 1405-9).

§ 1709. Foreclosure of mortgage on land outside of state.—When a bill is brought in the circuit court to foreclose a railroad mortgage, covering land partly in the state and jurisdiction of the court and partly outside, if the court has jurisdiction of the parties before it as defendants, and can through them enforce its decree on the land outside its jurisdiction, it will make a decree, although it may not be able to enforce its decree against the land itself. *Muller v. Dows*, 4 Otto, 448 (CORP., §§ 1574-79).

§ 1710. Trespass upon realty out of the jurisdiction.—When a suit is brought in a federal court for trespass, if the trespass is to the realty and the realty lies outside the jurisdiction of the court, it cannot take cognizance of the case. If the trespass is not to the realty, the action is transitory and the court will take cognizance of the case. *M'Kenna v. Fisk*, 1 How., 246. See ACTIONS, § 31.

§ 1711. Confirmation of grant in another state.—The federal court of one state has not jurisdiction to confirm a grant lying chiefly in another state. *Callender v. United States*,* Hemp., 334.

§ 1712. Suit affecting land in two counties.—Where a suit is brought affecting land in two counties, if the suit is brought in one of the counties, this gives the courts jurisdiction over both. *Nelson v. Moon*, 3 McL., 321.

§ 1713. Abating a Mississippi river bridge as a nuisance.—Where a bridge was built across the Mississippi river, and suit was brought to abate it as a nuisance, in the United States district court for the district of Iowa, it was held that as only one-half of the obstruction was within the district of the court the court had no jurisdiction to abate it. *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 493.

§ 1714. The act of February 10, 1855, dividing Ohio into judicial districts, provides that suits not of a local nature shall be brought in the district where defendant resides, or if there are two, where either resides. A defendant within the meaning of this act is "one who is a real and not merely a nominal party to the suit, and who has either directly or indirectly an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered." *Sackett's Harbor Bank v. Barry*,* 1 Bond, 154.

§ 1715. Process into other districts.—The circuit or district court of one district has no authority to issue its process into any other district, to compel the appearance of a person residing or found within the latter district before the court from which the process issued, or to stand committed for an alleged contempt of court. *Ex parte Graham*, 3 Wash., 458.

§ 1716. Suit to redeem land from mortgage.—On a bill in equity to redeem certain lands in West Virginia from a mortgage, it was held that it was no objection to the jurisdiction of the court that the lands in question lay beyond its district, as the suit was *in personam* against the mortgagee and must be brought where jurisdiction of his person could be obtained. *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*, 7 Blatch., 391.

§ 1717. Mill in one state supplied by water from another.—When a mill situated in one state is supplied by water which is wrongfully diverted by the defendant in another state, the federal court in this latter state may have jurisdiction to grant an injunction in the case. *Stillman v. White Rock Manuf. Co.*, 3 Woodb. & M., 542.

§ 1718. Canal in one state injuring land in another.—If a canal in New Jersey inflicts consequential damages upon a piece of land in Pennsylvania, the owner of the land may sustain an action in the federal circuit court in New Jersey, against the owner of the canal, a corporation chartered in New Jersey. *Rundle v. Delaware & R. Canal Co.*, 1 Wall. Jr., 288. See ACTIONS, §§ 24-32.

VI. JURISDICTION OF THE DISTRICT COURT.

[Jurisdiction in Admiralty, see MARITIME LAW.]

SUMMARY — *Act of district court having circuit court powers*, § 1719. — *Penalties and forfeitures*, § 1720. — *Suits by officers of the United States; receivers*, § 1721. — *Power to confirm titles under act of 1844*, § 1722.

§ 1719. Where a district court, which had also circuit court powers, rendered judgment in a suit by the postmaster-general of the United States, a case within the jurisdiction of both district and circuit courts, it was held that the act was that of a district court, and no writ of error would lie from the supreme court, as the granting by congress of circuit court powers added nothing to the jurisdiction in this case. *Southwick v. Postmaster-General*, § 1723.

§ 1720. The district courts have exclusive jurisdiction in suits to recover penalties and forfeitures under the customs laws, and the act of March 3, 1875, does not confer jurisdiction in these suits upon the circuit court, though in terms covering them. *United States v. Mooney*, § 1724.

§ 1721. Under Revised Statutes, section 563, the district court has jurisdiction of suits brought by an officer of the United States. A receiver of a national bank is such an officer, and may sue in that court without regard to the citizenship of the parties. *Frelinghuysen v. Baldwin*, § 1725.

§ 1722. The acts of May 26, 1824, and June 17, 1844, give to the district courts jurisdiction to confirm equitable or inchoate titles to land, which are derived from foreign powers and which the United States ought to confirm; but do not extend the jurisdiction to the determination of the validity of such titles as depending upon mere legal questions within the cognizance of any ordinary court of law. *United States v. McCullagh*, § 1726.!

[NOTES.— See §§ 1727-1766.]

SOUTHWICK v. POSTMASTER-GENERAL.

(2 Peters, 442-448. 1829.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This is a motion to dismiss a writ of error to a judgment rendered in the court of the United States for the seventh circuit and southern district of New York, in favor of the postmaster-general. The foundation of the motion is, that this court has no jurisdiction of the cause. The original judgment was rendered in the court for the northern district of New York, on which congress had conferred jurisdiction as a circuit court also. That judgment was removed into the circuit court sitting in the southern district, by writ of error, and was affirmed in that court. In May, 1826 (4 Stats. at Large, 192), congress enacted "that appeals and writs of error shall lie from decisions in the district court for the northern district of New York, when exercising the powers of a circuit court; and from decisions which may be made by the circuit court for the southern district of said state, in causes heretofore removed to said circuit court from the said district court sitting as a circuit court, to the supreme court of the United States, in the same manner as from circuit courts." The doubt respecting the jurisdiction of the court is produced by this act.

By the judicial act (*id.*, 73) the district courts have cognizance, concurrent with the circuit court, of all cases where the United States sue. By the act of the 3d of March, 1815 (3 *id.*, 235), it is enacted that the district courts of the United States shall have cognizance, concurrent, etc., of all suits at common law where the United States, or any officer thereof under the authority of any act of congress, shall sue, etc. This act gave the district court jurisdiction of all suits brought by the postmaster-general. It has been construed by this court to give the circuit courts cognizance of the same causes.

§ 1723. *Where a district court, having also the powers of a circuit court, renders judgment in an action of which both have concurrent jurisdiction, it acts as a district court, and a writ of error will not lie from the supreme court.*

The district courts which exercise circuit court jurisdiction do not distinguish in their proceedings whether they sit as a circuit or a district court. That is determined by the subject-matter of their judgments. Their records are all kept as the records of a district court. If the court for the northern district of New York sat as a circuit court when the original judgment was rendered against the plaintiff in error, this court can take jurisdiction of the judgment affirming it, which was rendered in the circuit court; if the original judgment was rendered by a district court, no writ of error lies to the judgment of affirmance pronounced in the circuit court. Had the court for the northern district of New York possessed no circuit court powers, it could still have taken cognizance of this cause. By conferring on it the powers of a circuit court congress has added nothing to its jurisdiction in this case. In taking cognizance of it, a district court has exercised the ordinary jurisdiction assigned to that class of courts. No extraordinary powers were brought into operation. We cannot say that a district court, performing the appropriate duty of a district court, is sitting as a circuit court, because it possesses the powers of a circuit court also.

The writ of error must be dismissed, this court having no jurisdiction in the case.

UNITED STATES v. MOONEY.

(Circuit Court for Massachusetts: 11 Federal Reporter, 476-478. 1882.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.— Action at law by the United States to recover \$20,000 penalties alleged to have been incurred by the defendant in an importation of goods from Canada by means of false invoices. The defendant moves to dismiss the suit for want of jurisdiction in the circuit court to entertain it. The government relies on the statute of March 3, 1875, chapter 137, section 1 (18 St., 470), "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states," etc.

§ 1724. *The district courts have exclusive jurisdiction in suits for penalties and forfeitures, and the act of March 3, 1875, does not confer this jurisdiction upon the circuit courts.*

This language, in its terms, includes this case, because the suit is of a civil nature at common law, and the United States are the plaintiffs; nevertheless, I am of the opinion that the circuit court has no jurisdiction of it. Down to 1875 it is admitted that the district courts had exclusive cognizance of all suits for penalties and forfeitures under the customs laws. The judiciary act of 1789, section 11 (1 St., 78), is, in its language and its intent, substantially like section 1 of the act of 1875. The latter enlarges the scope of the former in some particulars, but not in its general purport. The judiciary act was comprehensive enough to include actions for penalties in which the United States were plaintiffs; yet it did not include them. That statute, in its ninth section, gave to

the district courts exclusive cognizance of all suits for penalties and forfeitures incurred under the laws of the United States (1 St., 77), and this modified the scope of the eleventh section. *The Cassius*, 2 Dall., 365; *Evans v. Bollen*, 4 Dall., 342. Since that time the circuit courts have received concurrent jurisdiction with the district courts of many suits of a similar nature under the laws for the collection of internal revenue, to secure civil rights, to prohibit the slave trade, and many others; and, under the shipping act, it has exclusive cognizance of some cases which would seem to belong more properly to the district courts; but it has not, in so many words, been invested with jurisdiction of suits for penalties and forfeitures under the customs laws. The question is whether this is intended to be included in the grant of 1875.

The Revised Statutes of 1874, section 629, has twenty distinct paragraphs re-enacting the laws which granted original jurisdiction to the circuit courts, of which the first three represent section 11 of the original judiciary act, concerning civil suits between citizens of different states, or aliens and citizens, or where the United States are plaintiffs; the amount in dispute being, in all cases, more than \$500. Then follows: (4) All suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty jurisdiction, seizures, and suits for penalties and forfeitures. This is another mode of saying that the jurisdiction of suits for penalties and forfeitures remains exclusively vested in the district courts as before. In the succeeding clauses the jurisdiction given by a great variety of statutes is carefully restated and re-enacted.

If the statute of 1875 were intended to cover the whole ground of jurisdiction, and thus to repeal, by implication, all former laws, and blot out these numerous clauses of the Revised Statutes, it would diminish considerably the province of the circuit courts, while it would enlarge very much that of the state courts. It would limit the circuit courts by confining them, in suits upon patents, copyrights, and a great variety of other cases arising under the laws of the United States, to those in which the matter in dispute exceeds \$500. Such a construction, says McCrary, C. J., would be disastrous. *Third Nat. Bank of St. Louis v. Harrison*, 8 Fed. R., 721-2. It would enlarge the powers of the state courts by giving them concurrent cognizance of all such suits where the amount exceeds \$500; for a recognition of concurrent jurisdiction is a grant of it, though it may not have existed before. *Postmaster-General v. Early*, 12 Wheat., 136. I do not mean that congress can confer jurisdiction directly upon the state courts, but if congress creates rights between party and party, the state courts, by the necessity of their organization, are bound to enforce them, unless prohibited.

From these considerations I infer that the broad language of the first section of the act of 1875 was intended to apply to those ordinary suits to which similar words in section 11 of the act of 1789, and in clauses 1, 2 and 3 of section 629, R. S., by their connection and context, were necessarily confined, and was not designed to affect, either affirmatively or negatively, the exclusive jurisdiction of the circuit courts under the various statutes to which I have alluded, nor their concurrent jurisdiction with the district courts under other statutes, nor the exclusive jurisdiction of the district courts of suits for penalties and forfeitures under the customs laws.

In short, the argument is that section 11 of the act of 1789, and its reproduction in the Revised Statutes, included within itself the exception of cases not otherwise provided for by more special and definite provisions; and that

the act of 1875 carries a similar limitation, being intended simply to enlarge that part of the jurisdiction conferred by section 11, applying it to more cases, but to cases of a similar character. The restricted meaning attached to the general words by the usage of eighty-six years is presumed to continue. Motion to dismiss granted.

FRELINGHUYSEN v. BALDWIN.

(District Court for New Jersey: 12 Federal Reporter, 395-398. 1882.)

Opinion by NIXON, D. J.

STATEMENT OF FACTS.—This case arises upon demurrer to a plea. Frederick Frelinghuysen, the receiver of the Mechanics' National Bank of Newark, has brought suit against Oscar L. Baldwin, the late cashier, and his sureties upon their bond to the corporation conditioned for the faithful discharge of his duties as cashier. The plea demurred to avers that all the parties to the bond are citizens of the state of New Jersey, and that the court has no jurisdiction in such a case. By the provisions of the national banking act the comptroller of the currency is authorized, with the concurrence of the secretary of the treasury, under certain circumstances not necessary to be here stated, to appoint a receiver to wind up the affairs of the association. Section 5191 of the Revised Statutes. Such receiver, after giving the bond and security required by the comptroller, takes possession of the books, records and assets of every description of the association; collects all debts, dues and claims belonging to it; and, under the direction of a court of competent jurisdiction, may sell or compound all bad or doubtful debts, and dispose of all the real and personal property; and, when necessary to pay the debts of the association, may enforce the individual liability of the stockholders. His duties are to convert all the assets into money, and to pay the same to the treasurer of the United States, subject to the order of the comptroller, and to make report to that officer of all his proceedings. Section 5234. He is thus the agent of the United States for the performance of specified duties, and, by section 380 of the Revised Statutes, all his suits should be conducted by the district attorney of the United States for the district in which they are pending.

§ 1725. *The receiver of a national bank is an officer of the United States, and as such is entitled to sue in a district court. Authorities reviewed.*

The discharge of these duties necessarily implies the right of appealing to some court for aid; and the question raised by the demurrer is whether he may go in his own name into the district or circuit court of the United States for the collection of the debts or claims of the association. The fourth subdivision of section 563 of the Revised Statutes confers upon the district courts jurisdiction of all suits at common law brought by the United States, or by any officer thereof authorized by a law of congress to sue. This is a substantial re-enactment of the fourth section of the act of March 3, 1815. The present suit is one at common law, instituted by a receiver, who is authorized by law to sue. He is clearly within the statute if he is, in any proper sense, an officer of the government. Receivers are always regarded as officers of some sort. When appointed by a court they are the officers of the court. When appointed by lawful authority to do the work which congress charged the government to perform, why should they not be considered officers of the government? The second subdivision of the second section of the second article of the constitution of the United States has reference to the appointment of officers of the

United States, and the last clause authorizes congress, by law, to vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments. The secretary of the treasury is the head of the treasury department. Section 233. By section 324 the comptroller of the currency is the chief officer of a bureau of the treasury department, charged with the execution of all laws passed by congress relating to the issue and regulation of a national currency, secured by United States bonds. This officer, in cases of the insolvency of the association, appoints a receiver, through whose instrumentality the assets are turned into the treasury of the United States; but the comptroller performs this, as well as all other duties, under the general direction of the secretary of the treasury.

It is difficult to perceive on principle why appointments thus made are not appointments by the head of a department of the government, and why persons thus designated and charged with the performance of such duties should not be regarded as officers of the United States. The decisions of the supreme court, under analogous statutes, passed years before the one under consideration was enacted, afford us material aid in determining the question.

By the twenty-first section of the act of March 2, 1799 (section 2621 of the Revised Statutes), the collectors of customs are authorized, with the approbation of the secretary of the treasury, to employ proper persons as "weighers, gaugers, measurers and inspectors," and the courts have uniformly held that the congress, by such an enactment, was exercising its constitutional power of vesting by law in the head of a department the appointment of officers of the government. *United States v. Sears*, 1 Gall., 221; *United States v. Bachelder*, 2 Gall., 15; *Sanford v. Boyd*, 2 Cr. C. C., 78; *United States v. Barton*, Gilp., 439. Again, by the sub-treasury act of August 6, 1846, congress empowered the president to nominate and appoint four assistant treasurers of the United States, one of whom was to be located at the city of Boston, in the state of Massachusetts. By the general appropriation act of July 23, 1866, such assistant treasurer was authorized to appoint, with the approbation of the secretary of the treasury, certain clerks in the office for the safe-keeping, transferring and disbursing the public moneys. It was held by the supreme court in *United States v. Hartwell*, 6 Wall., 385 (CRIMES, §§ 835-41), that such clerks were officers of the United States, and were subject to all the penalties prescribed by the law against officers for the loaning to third persons any portion of the public moneys intrusted to them for safe-keeping. But in the present case we are not left to the analogies of other acts. It has been expressly decided, in every instance where the question has been raised and discussed, that receivers appointed under the national banking act are officers of the government, and as such are entitled under the specific provisions of law to sue. Thus in *Platt v. Beach*, 2 Ben., 303, after full argument and due deliberation, Judge Benedict, of the eastern district of New York, came to the conclusion that the receiver was an officer of the United States, and hence was competent to maintain actions at common law in the federal courts for the collection of claims due to the association at the date of his appointment. He has been followed by Judge Blatchford, in the southern district, in the case of *Stanton v. Wilkeson*, 8 Ben., 357 (BANKS, NAT., §§ 34-39).

In *Kennedy v. Gibson*, 8 Wall., 498 (BANKS, NAT., §§ 6-12), the plaintiff resided in New York, and was the receiver of the Merchants' National Bank of Washington, and brought his suit against certain stockholders in the circuit court of the United States for the district of Maryland. It is conceded that the

case turned upon other matters, and that the question involved here was not necessarily before the court in that case. But Mr. Justice Swayne, speaking for the whole court, in the conclusion of the opinion says: "The fifty-ninth section directs that 'all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury.' Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, *without reference to the locality of their personal citizenship.*"

Two years afterwards the late Justice Clifford, in delivering the opinion of the same court in *The Bank of Bethel v. Pahquioque Bank*, 14 Wall., 401 (BANKS, NAT., §§ 252-256), took occasion, as it would seem unnecessarily, to go out of his way to allude to and reiterate the correctness of the rule thus stated. The demurrer to the plea is sustained, with costs. The defendants have leave to plead within twenty days.

UNITED STATES *v.* McCULLAGH.

(13 Howard, 216, 217. 1851.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case arises on a petition filed by the appellees in the district court for the eastern district of Louisiana, praying that their title to a certain tract of land containing one thousand acres, situated on the Mississippi river, to the westward of Baton Rouge, may be declared valid and confirmed. They claim title under Alexander McCullagh, Sen., who obtained a grant from the British authorities while they were in possession of the country and before it was ceded to Spain. The grant was made on certain conditions therein specified, which it is not necessary to state, as the court is of opinion that the district court had no jurisdiction in the questions upon which the validity or invalidity of the title claimed by the appellees against the United States depends.

§ 1726. *The acts of 1824 and 1844 confer upon the district courts jurisdiction to confirm equitable and inchoate land titles, but not to decide legal questions arising upon them.*

The proceeding is under the act of June 17, 1844, and this court have always held that under that act the district court has jurisdiction in those cases only where the title set up by the petitioner is equitable and inchoate; and where there is no grant purporting to convey a legal title as contradistinguished from an equitable one. It is true that the cases heretofore decided have arisen under titles derived from the French or Spanish authorities while they respectively held the territory and exercised dominion over it. And this is the first case that has come before the court in which the title sought to be confirmed is derived from the government of Great Britain. But as respects the jurisdiction of the district court, claims of this description are placed by the act of 1844 on the same footing with those which are derived from France or Spain. The jurisdiction conferred in either case is that of a court of equity only; and the titles which the court is authorized to confirm are inchoate and imperfect ones, which, upon principles of equity, the government of the United States are bound to confirm and make perfect.

In this case, all of the questions upon which the title of the appellees de-

pend are strictly legal questions, to be decided in a court of law, in a suit at law. They are not, therefore, within the equity jurisdiction given by the acts of 1824 and 1844. There are no equitable considerations involved in the controversy; and the validity or invalidity of this claim can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them, and on that account they were not embraced in the acts of congress above mentioned. It appears, in this case, that the district judge had an interest in the land in question, and the cause was certified to the circuit court for the eastern district of Louisiana, under the act of March 3, 1821 (3 Stats. at Large, 643), and the decree affirming this title was passed by the circuit court. This decree must be reversed, and a mandate issued to the circuit court to dismiss the petition without prejudice to the rights of the United States or the appellees.

§ 1727. **Must appear on the record.**—The jurisdiction of the district court, this court being one of limited jurisdiction, must always appear on the record. *The Confiscation Cases*, 20 Wall., 107.

§ 1728. **Service — Appearance.**—The jurisdiction of the district court is acquired only by service of process or by the voluntary appearance of the parties. Where absent defendants decline to appear and have not been duly served, the complaint against them will be dismissed on motion. *Herndon v. Ridgway*,* 17 How., 424.

§ 1729. **Consuls.**—A district court of the United States may take jurisdiction of an action by a foreigner against a consul resident within the district of the court, for fees illegally exacted. *Lorway v. Lousada*, 1 Low., 78; 1 Am. L. Rev., 92 (CONSULS, §§ 30-34).

§ 1730. The jurisdiction conferred by the judiciary act upon the district court in suits against consuls is exclusive of the jurisdiction of state courts, and a judgment rendered against a consul in a state court will be reversed in the district court, whether or not it appears by the record that the question was raised below. *Davis v. Packard*,* 7 Pet., 276.

§ 1731. **Habeas corpus under act of March 2, 1833.**—Certain deputy and assistant marshals were arrested and confined under a warrant from a justice of the peace for acts done while attempting to arrest certain persons for aiding the escape of a fugitive slave, under a warrant from a United States commissioner. On *habeas corpus* under the act of congress of March 2, 1833, it was held that the court had jurisdiction under the act to determine the justice of their arrest, although it was under due process of another court; and that the prisoners should be discharged. *Ex parte Sifford*,* 5 Am. L. Reg., 659. Any judge of the supreme or district court of the United States has authority, under the act of congress of March 2, 1833, chapter 57, to grant a writ of *habeas corpus* in all cases where a person or persons are confined for any act done or omitted under any law of the United States, or any order, process or decree of any judge or court thereof; and the court to which it is returnable has authority to discharge the prisoner if the confinement is illegal. So held where three deputy marshals were arrested for assaulting a runaway slave, in an attempt to seize him under a proper warrant. *Ex parte Jenkins*,* 2 Am. L. Reg., 144.

§ 1732. The relator, while aiding the United States marshal to arrest a fugitive slave, was arrested under a warrant issued by a mayor. On *habeas corpus* issued by a judge of the district court it was held that the relator was a person within the act of congress of March 2, 1833; that the court had implied power, from the authority given to issue the writ, to determine the matter upon its return; and that the relator should be discharged. *United States v. Morris*,* 2 Am. L. Reg., 348.

§ 1733. **Habeas corpus to state court — Secretary of legation.**—The district court of the United States has no authority to issue a writ of *habeas corpus* to a state court to release from imprisonment a foreign secretary of legation who has been arrested and detained by the state officials on a criminal charge. *Ex parte Cabrera*, 1 Wash., 235.

§ 1734. **District of Oregon — Columbia river.**—The jurisdiction of the United States district court in Oregon extends over the whole of the Columbia river, concurrently with the authority of the state courts. *The Annie M. Small*, 2 Saw., 226.

§ 1735. **Equity jurisdiction in Louisiana.**—The district court of the United States in Louisiana has equity jurisdiction in proper cases, although the distinction between law and equity does not exist in the state courts. *Livingston v. Story*, 9 Pet., 652.

§ 1736. **Jurisdiction of land claims by act of 1824.**—The jurisdiction given the district court by act of May 26, 1824, is merely to confirm or reject claims of title founded on grants from foreign powers, and does not enable the court to partition a claim among the several claimants. *Putnam v. United States*,* *Hemp.*, 332; *Bullitt v. United States*,* *Hemp.*, 333.

§ 1737. **Revising action of surveyor-general.**—The federal district court has no jurisdiction in a case brought to revise the action of the surveyor-general locating the boundaries and measurements of a Mexican grant. *United States v. Sepulveda*, 1 *Wall.*, 108.

§ 1738. **Appeal from California land commissioners.**—The appeal given by the twelfth section of act of congress (31st August, 1852) to the district court from a decision of the California land commissioners is not in effect an appeal, but an institution of judicial proceedings in the district court. *United States v. Ritchie*, 17 *How.*, 525.

§ 1739. **French grants in Louisiana.**—A perfect title to land, under grants perfected before the cession of Louisiana to the United States, is not cognizable by the United States district court, under acts of congress of 1824 and 1844, relating to those grants. *United States v. Ducros*, 15 *How.*, 39.

§ 1740. **Place of seizure.**—In cases of seizure under the ninth section of the judiciary act of 1789, chapter 20, the district court of the district where the seizure is made has jurisdiction of the case, not the court of the district where the offense is committed. *The Merino*, 9 *Wheat.*, 401.

§ 1741. When a seizure of a vessel is made by revenue officers, within the judicial district of a United States district court, that court has exclusive jurisdiction of the case. If the seizure of the vessel is on the high seas, other district courts have jurisdiction. If the vessel seized is abandoned, no court has jurisdiction without a new seizure; but if, by stress of weather, the vessel is allowed to sail to a port of refuge, navigated by her own crew only, on agreement that she shall be there redelivered to the captor, this is no abandonment. *The Abby*, 1 *Mason*, 362.

§ 1742. The district court of the United States derives its jurisdiction in revenue matters from the act and place of seizure. When this is once acquired, no subsequent irregularity can avoid it. *The Schooner Bolina*, 1 *Gall.*, 60.

§ 1743. If a seizure for forfeiture is made within the judicial district of a United States district court, the court of that district has exclusive jurisdiction of the case. *The Little Ann*, 1 *Paine*, 41.

§ 1744. The district court where a vessel which has been fitted out for the slave trade is found and seized is the proper court to take cognizance of the offense. *United States v. Bark Reindeer*, 2 *Cliff.*, 57.

§ 1745. **Seizures under import law.**—The United States district court has exclusive original jurisdiction of seizures under the import law, etc. *Hall v. Warren*, 2 *McL.*, 333.

§ 1746. **Distribution of proceeds of forfeited property.**—The federal district courts, having jurisdiction of seizures for violation of the revenue laws, have also jurisdiction to distribute the proceeds of the sale of the forfeited property. *Robinson v. Hook*, 4 *Mason*, 144.

§ 1747. **Libel to enforce revenue duties.**—The district court of the United States has no jurisdiction of a suit by libel to enforce by forfeiture the payment of certain revenue duties. *United States v. 350 Chests of Tea*, 12 *Wheat.*, 498.

§ 1748. **Libel in rem where res is found.**—A libel *in rem*, in admiralty, may be filed in the United States district court for any district in which the *res* is found, irrespective of the place where the wrongful acts were committed upon which the libel is based. *The Slavers (Reindeer)*, 2 *Wall.*, 403.

§ 1749. **A proceeding in rem to declare forfeited certain stock of a railroad company** must be brought in the district court of the United States for the district in which such company is incorporated. No other district court has jurisdiction of the suit. *United States v. 1756 Shares of Stock*, 5 *Blatch.*, 235.

§ 1750. **Admiralty case between aliens.**—The district court of the United States in admiralty may take jurisdiction of a case between two aliens, if the objection is not raised before the hearing of the case, for the court has the capacity to hear such a cause, and the personal privilege of the parties should be asserted, if at all, before the answer, as an exception to the jurisdiction. *The Bee*, 1 *Ware*, 334.

§ 1751. **Mortgage of vessel.**—The United States district court in admiralty has no jurisdiction to decree the possession of a vessel to libelants on the ground that they are a majority of co-tenants, if their title is founded in a mortgage. *The Martha Washington*, 3 *Ware*, 251.

§ 1752. **Pilotage fees given by state law.**—A state law of New York prescribed that the services of the pilot first offering them to inward bound vessels in certain cases must be accepted, or he might claim half pilotage fees. *Held*, that upon the tender of such services the law raised an implied promise to pay the amount specified in the statute, and as the courts of ad-

miralty have jurisdiction of all maritime contracts, the claim might be enforced in the United States district court. *Held*, also, that although a state law cannot give jurisdiction to a federal court, yet a state law may create rights of such a character that they may be enforced in federal courts. *Ex parte McNiel*, 13 Wall., 242.

§ 1753. **Fugitive law of 1850.**—An indictment under the fugitive law of 1850, of which the district court has jurisdiction expressly given, and of which the circuit court has no jurisdiction under the act, cannot be transmitted from the district to the circuit court under the act of 1846 (8th August), sections 2 and 3. As this act is limited to criminal cases, it can have no application to civil actions under the fugitive act for the penalty. *Campbell v. Kirkpatrick*, 5 McL., 175.

§ 1754. **Confiscation of land under act of 1862.**—When an information against certain land was filed in the United States district court, under act of congress, July 17, 1862 (the confiscation act), alleging that the land had been seized by the marshal in compliance with written instructions from the attorney-general to the district attorney, by virtue of the above act, and a default was made in the case, the supreme court held that, the default admitting the allegations, the record showed a sufficient seizure of the land, and sufficient order of the president (through his agent, the attorney-general), to confer jurisdiction on the district court under the act. *The Confiscation Cases*, 20 Wall., 107.

§ 1755. **Removal from circuit to district court.**—A district court of the United States, though by act of congress it has the powers of a circuit court within its district, has no jurisdiction of cases irregularly brought in the circuit court of the United States, and removed to the district court. *Kerrison v. Stewart*, 1 Hughes, 69.

§ 1756. **Enjoining process of state court.**—The district court of the United States has no authority to issue an injunction to stay the process of state courts. *Ex parte Dudley*,* 1 Penn. L. J., 319.

§ 1757. **Suit by postmaster-general on official bond.**—The United States district court has jurisdiction of a suit brought in the name of the postmaster-general to recover a balance due on a postmaster's official bond. It is a suit by an officer of the United States, suing under the authority of an act of congress. Acts of March, 1815, and April, 1810. *Postmaster-General v. Early*, 12 Wheat., 144.

§ 1758. **Powers conferred by act of March 3, 1863.**—After repealing the circuit court powers given to certain district courts, congress enacted (March 3, 1863) that where the district court had rendered final judgments or decrees prior to the repeal, it should have power to issue writs of execution or other final process, or to use other legal powers and proceedings to enforce such judgments or decrees. *Held*, that the powers conferred were only such as might be necessary to insure the execution of the final process, such as were necessary to regulate and control the ministerial duties of officers; that if other powers became necessary, recourse must be had to the circuit court; also, that the final judgments or decrees referred to were those disposing of the whole case, so that it only remained to issue final process. *Bronson v. La Crosse Railroad Co.*,* 1 Wall., 405.

§ 1759. **Suit against administrator—Probate courts.**—The district court of the United States has jurisdiction of a suit against administrators on a judgment obtained against the deceased, although by the state laws all such judgments must be entered in the probate court as liabilities of the deceased. *United States v. Drennan*, Hemp., 324.

§ 1760. **In bankruptcy.**—The district court, under section 6 of the bankrupt act of August 19, 1841 (5 U. S. Stat. at L., 445), has jurisdiction of a suit by an assignee in bankruptcy, of a voluntary bankrupt, to recover a balance due from the defendants as commissions at the time of the presentation of the bankrupt's petition. *Kelly v. Smith*, 1 Blatch., 290 (AGENCY, §§ 703-707).

§ 1761. Independent of the bankrupt act, the district courts of the United States have no equity jurisdiction. Under that statute the court has power to decide upon the validity of liens and mortgages upon the bankrupt property, and the supreme court has no revising power over such decree. *Ex parte Christy*, 3 How., 312.

§ 1762. The United States district court has jurisdiction of an action by an assignee in bankruptcy to recover property of the bankrupt, although the defendant is a citizen of the same state as himself, and was not a party to the proceedings in bankruptcy. *Atkinson v. Purdy*, Crabbe, 551.

§ 1763. When a fund belonging to a bankrupt is in the possession of the federal district court, that court will take jurisdiction of a bill in equity to settle the title to that fund, although all the parties are citizens of the same state. *In re Sabin*,* 18 N. B. R., 155.

§ 1764. A United States district court has no authority, under the bankruptcy act of 1867, to enjoin judgment creditors of the bankrupt from prosecuting their claims in the state courts. *Campbell's Case*, 1 Abb., 186.

§ 1765. The district court has jurisdiction in bankruptcy to enjoin a state officer, *e. g.*, a

sheriff, from selling on execution property of the bankrupt over which the district court has acquired jurisdiction. *In re Tift*, 11 Fed. R., 464.

§ 1766. **Enjoining its decree in admiralty while sitting in bankruptcy.**—The district court sitting in equity, in the exercise of the jurisdiction conferred by the bankrupt act, has authority to issue a perpetual injunction against the execution of its own decree, made while sitting in admiralty, the decree and levy having been rendered of no effect by the subsequent proceedings in the cause. *Dutcher v. Woodhull*, 7 Ben., 313. As to Jurisdiction in Bankruptcy, see DEBTOR AND CREDITOR.

VII. COURT OF CLAIMS.

[Appeals from Court of Claims, see APPEALS. Government Contracts and Claims, see GOVERNMENT.]

§ 1767. **Is governed by law and equity.**—The court of claims is governed in its decisions by the principles of the common law. *Moore v. United States*, 1 Otto, 274.

§ 1768. The court of claims administers the established rules of law and equity. *Todd v. United States*,* Dev., 83.

§ 1769. It is the duty of the court of claims to expound the law as they find it established and apply it to the cases before them, and not to create it — *jus dicere*, and not *jus dare*. *Todd v. United States*,* Dev., 175.

§ 1770. In cases before the court of claims arising out of contracts express^d or implied, the ordinary principles of contracts, as applied between individuals, must be followed, and appeals to the magnanimity and generosity of the government, or to abstract ideas of equity, cannot be entertained. *Smoot's Case*, 15 Wall., 36.

§ 1771. The court of claims, in giving an opinion to congress, should give an opinion based on the rules of law and the evidence in the case, not one founded on natural equities. *Todd v. United States*,* 18 Law Rep., 632.

§ 1772. Where a contractor sought to recover for extra work done on a public building at the request of the government officers, the court refused to allow him anything for his work in excess of the sum which congress had fixed as the limit of the price to be paid for the building, saying "the rule and principle adopted by this court for the administration of justice between a claimant and the government is simply to give that measure of relief which the law would award were the action between man and man. The court never gives greater and never gives discretionary relief." *Curtis v. United States*,* 2 Ct. Cl., 144.

§ 1773. **Jurisdiction is by consent of government, and depends on acts of congress.**—The court of claims gets its jurisdiction over suits against the United States solely by consent of the federal government as expressed in the acts of congress conferring this jurisdiction. Any case, therefore, must be brought strictly within those acts. *De Groot v. United States*,*5 Wall., 431.

§ 1774. The jurisdiction of the court of claims is confined strictly to those cases given it by act of congress. If congress chooses to withdraw any of those cases from its jurisdiction, it may. *Ibid.*

§ 1775. This court has only such jurisdiction as is expressly conferred by congress or necessarily implied from the terms they have used. Hence, under section 3 of the act of March 12, 1863, it can only decide (1) whether the claimant was owner of the property; (2) whether he is entitled to the proceeds; (3) whether he has given any comfort or aid to the rebellion; and if proved satisfactorily, certify these facts to the treasury department. *Bond v. United States*,* 2 Ct. Cl., 529.

§ 1776. Congress has power to revoke the authority conferred on a head of a department to adjust a certain claim against the government, by repealing the resolution giving him such authority, and may refer the case to the court of claims. *De Groot v. United States*,*5 Wall., 431.

§ 1777. The jurisdiction of the court of claims depends entirely upon acts of congress. Under the abandoned and captured property act (March 12, 1863), suit may be brought against the United States within two years from the end of the Rebellion. This remedy is exclusive of any other, and if two years have elapsed, the owner of the property is without remedy. *Haycraft v. United States*, 22 Wall., 92.

§ 1778. **Equity jurisdiction.**—As the court of claims has no equitable jurisdiction, and can only take cognizance of contracts authorized by law, the holder of a military bounty-land warrant has no legal right against the United States on the allegation that it has wrongfully appropriated to other uses the lands ceded for his benefit. *Bonner v. United States*,* 9 Wall., 156.

§ 1779. **Extent of jurisdiction.**—The court of claims is a court of the United States for the United States, and its jurisdiction extends throughout the United States. So held on a

question as to whether this court was within a statute relating to evidence in any court in the District of Columbia. *Jones v. United States*,* 1 Ct. Cl., 383.

§ 1780. — **Judicial notice.**— It is not necessary to prove the law of any state in the court of claims as a foreign law, for the court of claims is a court of general territorial jurisdiction, administering the laws of the different states by taking judicial cognizance of them. *Sykes v. United States*,* 8 Ct. Cl., 330.

§ 1781. **Classes of claims within the jurisdiction.**— The jurisdiction of the court of claims includes only claims falling within one of the three classes specified by the act creating the court, or, if referred to the court by either house of congress, it must be a claim founded on some legal right. *Lindsay v. United States*,* Dev., 105. In either case it will decide according to the principles of law. *Todd v. United States*,* id., 106.

§ 1782. The jurisdiction of the court of claims is limited to claims founded upon a law of congress, or upon a regulation of an executive department, or upon a contract, express or implied, with the government. *Knote v. United States*, 5 Otto, 156.

§ 1783. **Torts.**— The court of claims has no jurisdiction of claims against the United States founded on tort. *Reed v. United States*, 11 Wall., 603; *Milwaukee and Rock River Canal Co. v. United States*,* 1 N. & H., 188.

§ 1784. The jurisdiction of the court of claims is confined to suits arising from contracts express or implied. The reason for this is that while congress is willing to subject the government to the enforcement of valid contracts, which could be valid only when made by an officer acting under lawful authority, and invested with power to make such contracts, the essence of a tort is that it is an unlawful act, and it would be unwise to subject the government to the payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives. *Langford v. United States*,* 11 Otto, 341.

§ 1785. The jurisdiction given to the court of claims by congress includes claims against the United States founded on contract or implied *assumpsit*, but excludes claims founded on torts. Where one contracted to deliver a certain quantity of oats to the federal army, and delivered part and then was prevented by the government officers from delivering the rest; but afterwards, being threatened if he did not deliver the rest, went into the market and bought a sufficient quantity to make up the deficiency, *held*, he could recover the contract price for such portion, but not an advance in the market. *Gibbons v. United States*, 8 Wall., 274.

§ 1786. A collision at sea is a marine tort, and the court of claims has no jurisdiction of it. *Dennis v. United States*,* 2 N. & H., 212.

§ 1787. A suit for damages for illegal arrest and imprisonment is an action of tort of which the court of claims has no jurisdiction. The damages resulting therefrom to the business of the claimant are also too remote and accidental. *Spicer v. United States*,* 1 Ct. Cl., 316.

§ 1788. Where the warden of a penitentiary made use of a patented machine, belonging to the claimant, without right, *held*, that this court had no jurisdiction of the claim, as it lay in tort, and not on an implied promise. *Pitcher v. United States*,* 1 Ct. Cl., 7.

§ 1789. **Claim for use of patent.**— Where the government purchases stamps for postmarking letters, which infringe a patent, and the patentee allows the postoffice to use the stamps at the request of the postmaster-general, but on the understanding that the postmaster-general has no authority to purchase the patent, and that he is to look solely to congress for his pay; and congress never agrees to pay him, no claim lies for the use of the patent in this court. *Shavor v. United States*,* 4 Ct. Cl., 440.

§ 1790. **Contract with patentee.**— This court has jurisdiction of a suit brought upon a special contract with a patentee, whereby the use of the invention by the United States was authorized, and agreed to be paid for. *Burns v. United States*,* 4 Ct. Cl., 113.

§ 1791. **Claim for public service.**— Where a public service has been performed at the request of the proper government agents, and under the expectation of compensation, and congress, upon application to it, refers the matter to the court of claims, that court is authorized to make and adjudge such an allowance as is required *ex aequo et bono* by all the circumstances of the case. *Roberts v. United States*, 2 Otto, 48.

§ 1792. **Claim for secret service.**— A claim on the government for compensation for secret service within the lines of an enemy in time of war is not cognizable by the court of claims, on account of the impropriety of making public the secret service of the government. *Totten v. United States*, 2 Otto, 106.

§ 1793. **Claim for salvage.**— The court of claims has jurisdiction of a claim against the government for salvage, such claim being founded on an implied promise, and being within the jurisdiction of the common law courts. *Bryan v. United States*,* 6 Ct. Cl., 128.

§ 1794. **All questions of salary** are questions of contract, and whether the salary is fixed by law, or by the order of a department under authority of law, the government contracts

to pay the officer his salary, and failing to do so, a suit therefor may be maintained in this court, whether the case arises under a revenue act or any other. So held where a collector of customs sued for the balance of his salary, fixed under the provisions of the internal revenue act, which he had been illegally compelled to repay into the treasury. *Patton v. United States*,* 7 Ct. Cl., 362.

§ 1795. **Extra materials.**—The court of claims has no jurisdiction of a claim by a contractor for materials furnished by him outside the materials called for by the contract with the government, unless there is either an express or an implied contract on the part of the government to pay for such materials. *Hawkins v. United States*, 6 Otto, 698.

§ 1796. **Claim to land warrant.**—This court has original jurisdiction of a claim to a land warrant arising under the acts of congress of March 3, 1855, and May 14, 1856, for services in the army; and it is no objection that the claim has been passed upon and rejected by the commissioner of pensions (although the act makes his decision final, subject only to appeal to the secretary of the interior), for no acts of the executive departments are judicial in their character unless made so by some special law, and though binding on the other departments are not so on the courts. *Alin v. United States*,* 1 Ct. Cl., 133.

§ 1797. The court of claims has no jurisdiction of a claim founded on a Revolutionary land warrant. The claim must be made to the secretary of the interior. *Chamberlain v. United States*,* 20 Law Rep., 631.

§ 1798. The jurisdiction of the court of claims only includes demands against the United States for money due. A claim for the issue of a land warrant by the United States to the plaintiff cannot be entertained in that court. *United States v. Alire*, 6 Wall., 575 (APPEALS, § 2924).

§ 1799. **Claim for bounty land.**—The court of claims cannot take jurisdiction of any claim for bounty land till it appears that application has been made and refused at the proper department. *Jewett v. United States*,* 20 Law Rep., 633.

§ 1800. **Claim for bounty not authorized by congress.**—This court has no power to allow a claim for a bounty not authorized by the acts of congress, although congress has in many instances allowed the bounty in similar cases. *Parlin v. United States*,* 1 Ct. Cl., 174.

§ 1801. **Acting as pension agent while pay is prohibited by statute.**—A. acted as pension agent during a period when, by statute, payment to such agent was forbidden. *Held*, that he could recover nothing for his services in the court of claims. *Knapp v. United States*,* Dev., 133.

§ 1802. **Recovery back of money paid on judgment.**—When money is retained under the award of commissioners specially clothed with jurisdiction of the subject-matter, and from whose decision there is no appeal to this court, it is in effect money paid under a judgment, and no action is maintainable in this court to recover it back, as a judgment cannot be set aside in that way. *New England & Miss. Land Co. v. United States*,* 1 Ct. Cl., 135.

§ 1803. **Claim made up of interest.**—*Quære*: Whether this court has jurisdiction to allow a claim, the entire body of which is made up of interest, prohibited, as it is, from allowing interest as the incident of a debt. *Gordon v. United States*,* 1 Ct. Cl., 1.

§ 1804. **Judgment for implied rent—Subsequent occupation.**—After the implied rent of premises owned by the claimants and occupied by the government has been judicially settled, it will remain fixed as though the parties had leased and rented the premises on those terms. Hence, where the government continued to occupy certain premises after judgment, in a suit for their rent for the claimant, without making any new contract, the court held that the annual value of the premises as determined by the former suit was the measure of damages in the present action. *Johnson v. United States*,* 8 Ct. Cl., 243.

§ 1805. **Reversion of confiscated property.**—The court of claims has no jurisdiction of an action of contract based on the theory that by the general pardon and amnesty of December 25, 1868, the proceeds of confiscated property in the treasury of the United States reverted to the owner of the property. *Knote v. United States*,* 24 Int. Rev. Rec., 4.

§ 1806. **Action on bonds of republic of Texas assumed by United States, lost before indorsement and paid by mistake.**—An action may be maintained against the United States on bonds of the republic of Texas, which have been assumed in part by the United States, which bonds have been lost or stolen before indorsement by the payee and paid by the treasury through mistake. *Morrill v. United States*,* 7 Ct. Cl., 421.

§ 1807. **Claim assumed by treaty.**—The court of claims has no jurisdiction of a suit for rent of premises for which the government is liable by virtue of an obligation assumed for the Indians and ratified by treaty. *Langford v. United States*,* 12 Ct. Cl., 338.

§ 1808. **Claims for the settlement of which a special tribunal is created.**—When an individual's claim against a foreign government is assumed by the United States by treaty, and a special tribunal created in which he must assert his claim, he cannot sue the government in the court of claims. *Meade v. United States*,* 2 N. & H., 275.

§ 1809. **Claims arising under the revenue laws.**—Cases arising under the revenue laws are not within the jurisdiction of the court of claims. *Nichols v. United States*, 7 Wall., 131.

§ 1810. A claim against the United States, under the revenue laws, for money paid as duties in excess of what should have been charged, being based upon an implied promise to repay as money erroneously exacted, is within the jurisdiction of this court, although congress may have provided another remedy by the act of February 26, 1845, against the collector. *Schlesinger v. United States*,* 1 Ct. Cl., 16; *Nicoll v. United States*,* 1 Ct. Cl., 70; *Ogden v. United States*,* 1 Ct. Cl., 96; *Elliott v. United States*,* 1 Ct. Cl., 96.

§ 1811. The rule in *Nicoll's Case*, 7 Wall., 122, that cases arising under the revenue laws are not within the jurisdiction of the court of claims, is limited to the cases of persons who complain of illegal assessments of taxes and illegal exaction of duties, for whose benefit congress has, by the revenue laws, provided a system of special relief. All other cases, whether arising under the revenue laws or not, which do not come within that system of special relief, are not excluded from the jurisdiction of this court. Hence this court has jurisdiction of a suit by a collector of internal revenue, who deposited a sum in the treasury to compromise a claim against him for an offense under the revenue laws, which compromise has not been accepted, to recover back the sum so deposited, the government having retained it in part payment of an assessment for taxes and penalties against the depositor. *Boughton v. United States*,* 12 Ct. Cl., 330.

§ 1812. A claim for a drawback under the one hundred and seventy-first section of the internal revenue laws, approved June 30, 1864 (13 Stat. at Large, p. 223), is not within the jurisdiction of this court. *Portland Co. v. United States*,* 5 Ct. Cl., 441.

§ 1813. Cases arising under the revenue laws are not within the jurisdiction of the court of claims. Hence where imported goods were sold for non-payment of duties, and there was a dispute as to the amount of the surplus caused by the different amount of duties leviable named by the different parties, the court held it was a case arising under the revenue laws, and not therefore within its jurisdiction. *Doherty v. United States*,* 6 Ct. Cl., 90.

§ 1814. Where a manufacturer furnishes his own die for stamps under the provisions of the internal revenue act, the obligation on the government to pay him the commission allowed by that act is the simplest form of a direct contract, and an action for such commission is within the jurisdiction of this court. *Daily v. United States*,* 7 Ct. Cl., 383.

§ 1815. A suit to recover an allowance for the leakage of spirits, to which the claimant, a distiller, is entitled under regulations issued by the commissioner of internal revenue, dated December 15, 1863, the application for such an allowance having been refused by the commissioner, is not within the jurisdiction of this court, because it is a claim arising under the revenue laws within the scope of the decision of the supreme court in *Nicoll's Case*, 7 Wall., 122. *Turner v. United States*,* 9 Ct. Cl., 367.

§ 1816. Under the act of June 30, 1864, whether this court has jurisdiction of an action for the overpayment of unascertained duties depends upon whether the secretary of the treasury has satisfied himself that the overpayment averred by the claimants has been made. If he has not, it is a case under the revenue laws and beyond the court's jurisdiction; if he has, it is the case of a simple contract, and the action may be maintained. It seems, however, that this rule would not apply to the case of duties paid under protest, as that class of cases is distinguished. *Broulatour v. United States*,* 7 Ct. Cl., 555.

§ 1817. When a claim for the repayment of an internal revenue tax illegally assessed and paid has been presented to the commissioner of internal revenue, and by him allowed, there arises an implied promise on the part of the government of the United States to pay the same, and the court of claims, therefore, has jurisdiction of the case. *United States v. Savings Bank*, 14 Otto, 732.

§ 1818. When a claim for repayment of an excess of special tax paid by a brewer has, under the authority of Revised Statutes, sections 3238, 3244, 3426, been allowed by the commissioner of internal revenue, but payment is refused by the treasury, the court of claims has jurisdiction of the claim, either as one "founded upon a law of congress, or an implied promise of repayment by the government." *United States v. Kaufman*, 6 Otto, 568.

§ 1819. — **by informer.**—The court of claims has jurisdiction of a suit by an informer to recover his share of a forfeiture under the revenue laws, allowed by the act of March 2, 1867. *Shelton v. United States*,* 8 Ct. Cl., 487.

§ 1820. Under the act of March 2, 1867 (R. S., § 3090), which provides that the proceeds of forfeitures under the revenue laws, after payment of expenses, shall be paid into the treasury, and distributed under the direction of the secretary of the treasury, the court suggest that they would have jurisdiction of an action by an informer to recover the share of the proceeds to which he is entitled under the revenue laws, after the proceeds have been paid into the treasury; but they refrain from deciding the point. *Bradley v. United States*,* 12 Ct. Cl., 578.

§ 1821. **Claim referred by special act.**—Under the act of August 14, 1876, referring the claim of certain contractors for labor done and materials furnished under their contract to the court of claims for hearing and adjudication, and authorizing the court to adjust the accounts between the claimants and the government as a court of equity jurisdiction, and, under the principles of equity, to reform the contract and render such judgment as justice and right require, this court has no power to allow the claimants anything for the damages sustained by them from the changes in the plans and specifications furnished by the government, and under which they were to work. Under the act the court has only authority to hear and determine claims for labor done and materials furnished. *Harvey v. United States*,* 3 Ct. Cl., 322.

§ 1822. The reference of a particular claim by a private act to the court of claims, to examine the same, and determine and adjudge what amount, if any, is due, does not ratify the services for which the amount is claimed, and leave the court nothing to decide but the amount due; but leaves the court free to exercise all its judicial functions, and to determine whether any claim existed. *Roberts v. United States*,* 6 Ct. Cl., 84.

§ 1823. The claimants brought an action on a written contract, and obtained judgment which was satisfied; but owing to the inability of the court to grant equitable relief, the full amount of their demands was not paid. Congress thereupon passed the act of August 14, 1876, referring the claim to this court, authorizing it to reform the contract, and to that end conferring equity jurisdiction. *Held*, that the intention of congress was simply to supply a defect of jurisdiction, not to undo what had been done and reopen demands which had been judicially determined; and that therefore the relief given by the court sitting as a court of equity must be limited to matters not before determined because of its inability to sit as such. *Harvey v. United States*,* 12 Ct. Cl., 141.

§ 1824. When a claim is referred to the court of claims for "adjustment and settlement" by a private act, and that act directs that the "court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases," and it appears that congress has been in the habit of allowing interest on such claims, this court will allow interest also in the case of this claim. *McKee v. United States*,* 10 Ct. Cl., 231.

§ 1825. When a claim primarily against another government (in this instance the state of Virginia) is referred to the court of claims for "adjustment and settlement" by a private act, and no right of appeal is given by the private act, no appeal will lie from the judgment of the court. *Ibid*.

§ 1826. When the court of claims is directed by a private act to hear and determine a claim arising out of the treaty obligations with Mexico, and is authorized to use certain evidence taken before the commission which sat under the treaty, the case can derive no benefit from the general powers and jurisdiction of the court; but the court occupies toward the case the same position as the board of commissioners. Hence the commissioners having allowed interest on their awards, and the amounts so fixed having been paid by the United States, this court will allow interest on the present claim. *Atocha v. United States*,* 8 Ct. Cl., 427.

§ 1827. When this court has jurisdiction of a suit by reason of a private act of congress which names the party whom it authorizes to sue, and only authorizes the court to hear and determine his particular claim, this court has no authority to take cognizance of the assignment of the claim, or to allow the assignee to become a party to the record and prosecute the suit. *Atocha v. United States*,* 6 Ct. Cl., 69.

§ 1828. When a case is brought into the court of claims under a private act, which allows an appeal to the supreme court within ninety days, the provisions of the general law of March 3, 1863, being unrepealed and not inconsistent with the private act, remain in force; and an appeal, if taken, must be made subject to the rules of the supreme court as provided for in the last named act. *Hubbell v. United States*,* 6 Ct. Cl., 53.

§ 1829. The claim of Atocha against the Mexican government, being among those assumed by the United States government under the treaty of Guadalupe Hidalgo, was laid before congress, and by it referred to the court of claims to examine into the justice of the claim and whether it was embraced in the treaty, and, if so, to fix and determine the amount, and when so determined the act declares it shall be paid. From that decision of the court of claims no appeal lies to the supreme court of the United States. *Ex parte Atocha*, 17 Wall., 443.

§ 1830. Congress has power to withdraw from the jurisdiction of the court of claims any class of cases which have before been committed to its control, or to prescribe the rule by which such cases may be determined. And the same power exists with reference to particular cases. When, therefore, congress revokes a power conferred on a head of a department to adjust a certain claim against the government, and directs him to transmit all papers relating to the case to the court of claims for examination, the court is bound by any limitations in the decision of the case which congress chooses to make. *De Groot v. United States*,* 5 Wall., 419.

§ 1831. Where a claim was brought into this court under a special resolution of congress repealing an award previously made, and sending the case to this court to be tried on its merits, irrespective of the award, *held*, that congress had absolute authority to regulate as it pleased what claims should be prosecuted in this court; and, as the act giving the court jurisdiction in this case had excluded the award, it could not be considered by the court. *De Groot v. United States*,* 1 Ct. Cl., 97; 2 Ct. Cl., 539.

§ 1832. Where a private act (June 23, 1874) authorizes the court to "investigate" a claim, and "to ascertain, determine and adjudge the amount equitably due, if any, for such loss and damage," the claimants cannot recover damages for their inability to purchase on a rising market, from the government's delay in making payments, nor the discount paid by them on certificates of indebtedness which they voluntarily accepted in part payment of their accounts against the government; nor for the delays in auditing the claimants' accounts, in the regular routine of public business, beyond the contract time. *Tillson v. United States*,* 11 Ct. Cl., 758.

§ 1833. On a rehearing under a joint resolution of congress authorizing this court to grant it, if justice would be thereby subserved, "without prejudice to the claimant by reason of the former decision of said court," this court is bound by the interpretation of the contract put upon it by the treasury department and by this court at the former trial, accepted and approved of by congress, and acquiesced in by the claimant. *Gibbons v. United States*,* 2 Ct. Cl., 353.

§ 1834. Where congress refers a case to the court of claims, with directions to find in favor of the claimant, notwithstanding a technical objection, if he be otherwise entitled, and the natural meaning of the resolution shows that it only applies to that one particular claim, the claimant cannot take advantage of the resolution to remove the same technical difficulty in a second suit, although the second suit is for the rent of the same premises as that recovered in the first suit, for a period subsequent to that for which rent had been recovered in the first suit. *Cross v. United States*,* 5 Ct. Cl., 88.

§ 1835. **Re-reference by congress after judgment.**—The constitution has invested congress with no judicial power, and congress cannot direct a court to find a judgment in a certain way. But when congress referred a claim anew to this court, after judgment for the United States, it was held to amount simply to a consent not to plead the former trial nor interpose the former defense, congress having the same power to consent to the second action as to the first. *Nock v. United States*,* 2 Ct. Cl., 451.

§ 1836. **Set-off in favor of government.**—Under the third section of the act of March 3, 1863, the court of claims has authority, in suits against the United States, to hear and determine demands of the government of every kind against the claimant, or those whom the claimant represents, whether liquidated or unliquidated, and to set off against the claim in suit the amount found in favor of the United States upon such hearing and determination. *Allen v. United States*, 17 Wall., 207.

§ 1837. This court has no authority, on a claim by an officer for pay under the act of March 30, 1814, to deduct the amount taxable as income tax on the officer's salary. *Jones v. United States*,* 4 Ct. Cl., 197.

§ 1838. **Transmission of claim from head of department.**—The jurisdiction of the court of claims was enlarged in June 25, 1868, by act of congress providing that the head of any executive department might, in certain cases of claims against his department, refer them to the court of claims, to be proceeded with as if begun there by the voluntary action of the claimant. *United States v. Lippitt*, 10 Otto, 666.

§ 1839. When the executive department transmits claims to the court of claims for adjudication, it should send a certificate, showing that the claims are within the act authorizing the department so to transmit them. *In re Kountze*,* 13 Op. Att'y Gen'l, 164.

§ 1840. — **limitation.**—Under the act of June 25, 1868 (R. S., § 1063), the head of a department may transmit a claim to this court after the auditor and comptroller have settled it and certified a balance due to the claimant. And in such a case the statute of limitations cannot be pleaded. *Winnisimmet Co. v. United States*,* 12 Ct. Cl., 319.

§ 1841. — **act of March 30, 1868.**—The court of claims, under the act of March 30, 1868, which enacts that balances, when stated by the auditor, and properly certified by the comptroller, as provided by the act of March 3, 1817, shall be conclusive upon the executive departments, and be subject to revision only by congress or the proper courts, is a proper court within the meaning of the act. And under the act of June 25, 1868, section 7, the head of a department in which a claim arises, after the amount due the claimant has been certified to him by the auditor and comptroller, may send the claim to the court of claims for revision, although the act requires him to transmit "all the vouchers, papers, proofs and documents pertaining thereto" with it, and such vouchers, papers, etc., have been sent to the auditor, and are beyond his control. *Delaware Steamboat Co. v. United States*,* 5 Ct. Cl., 55.

§ 1842. **Claim arising under act of congress.**—This court has jurisdiction of a claim that arises out of and is founded upon an act of congress. It has jurisdiction, therefore, of a claim by a captain in the Texas navy, at the time of the annexation of Texas, under the act of March 3, 1857, entitling the surviving officers of such navy to certain pay. *Moore v. United States*,* 4 Ct. Cl., 139.

§ 1843. **Claim under regulation of executive department.**—This court has jurisdiction of claims arising under a regulation of an executive department; but as this jurisdiction is to be exercised according to and subject to the laws of the United States, the regulation must be made under an act of congress authorizing the department to make it. *Harvey v. United States*,* 3 Ct. Cl., 38.

§ 1844. **Claim allowed by auditor, but payment refused.**—If a claim against the United States is allowed by the proper auditing officer, and the treasury department refuses to pay it, the action to recover it may be brought in the court of claims. *United States v. Kaufman*,* 24 Int. Rev. Rec., 135.

§ 1845. **Refusal of secretary of treasury to pay judgment against United States — Remedy.**—A claimant having recovered a judgment against the United States under the abandoned or captured property act, the secretary of the treasury undertook to revise the judgment of the court, and refused to pay the claimant the full amount of the judgment. *Held*, that the question whether *mandamus* would lie against the secretary to compel him to pay the judgment was too uncertain to render it a certain and effectual remedy within the control of the party needing its aid, and that this court had jurisdiction of a suit on the judgment for the unpaid balance which had been retained in the treasury. *Brown v. United States*,* 6 Ct. Cl., 171.

§ 1846. **Refusal of credit by accounting officer.**—No cause of action can arise in the court of claims for a credit at the treasury which is refused by the accounting officer of that department, until said officer has actually refused to give the credit. *United States v. Clark*,* 24 Int. Rev. Rec., 275.

§ 1847. **Claims must be first presented to proper department.**—Under the act of February 24, 1855, the court of claims has jurisdiction of a claim such as is ordinarily settled in an executive department, although the claim has never been presented to any department for payment; but under the act of March 3, 1863, reconstructing the court, it cannot give judgment for such claim until the demand has been submitted to the proper department for payment. *Sweeney v. United States*,* 5 Ct. Cl., 285.

§ 1848. **Abandoned or captured property act.**—Under the abandoned and captured property act, this court has jurisdiction only of the proceeds of the property mentioned in the first section; and as that section especially excepts property used in waging war against the United States, such as steamboats, etc., this court has no jurisdiction of a claim for the proceeds of two steamboats which had been seized by the Confederate States and used as transports, although against the will of the owner. *Gearing v. United States*,* 3 Ct. Cl., 165.

§ 1849. The jurisdiction of this court over cases arising under the abandoned or captured property act of March 12, 1863, is final and conclusive, and no appeal lies from its decision to the supreme court. *Pargoud v. United States*,* 4 Ct. Cl., 349.

§ 1850. Under the abandoned and captured property act the court of claims has no jurisdiction to adjudge cases of claims against property seized by the United States, which has been used in waging and carrying on war against the United States. *Slawson v. United States*, 16 Wall., 312; 6 Ct. Cl., 370. The act of July 2, 1864, extending the provisions of the former act to descriptions of property mentioned in the acts of July 13, 1861, and July 17, 1862, does not extend them as to any description of property mentioned in the proviso. The proviso, therefore, being still in force, this court has no jurisdiction of a claim for the proceeds of a steamer impressed and used in the rebel military service. *Slawson v. United States*,* 6 Ct. Cl., 370.

§ 1851. On a claim under the abandoned or captured property act, although the government agent may have let out the picking and ginning of cotton from the claimant's plantation on such enormous shares as to constitute a fraud, yet this court cannot go beyond the proceeds which have actually found their way into the treasury; and the claimant in such cases must seek further relief in an action against the parties who have conspired to defraud him. *Gaither v. United States*,* 3 Ct. Cl., 191.

§ 1852. When a petition under the abandoned or captured property act, in the name of two claimants, sets up a joint title and common interest, but the evidence in the case shows that only one of the parties is entitled; yet if the petition has been verified by the oath of that party, the court will give judgment according to the petition and not for him individually. *Richmond v. United States*,* 7 Ct. Cl., 533.

§ 1853. An action will lie in this court under the abandoned or captured property act (12 Stat. at L., 820) to recover a certain sum of treasury notes, advanced by a loyal citizen dur-

ing the rebellion to satisfy the mortgage of another, and which had been seized by a military officer and turned over into the treasury. *Mezeix v. United States*,* 6 Ct. Cl., 232.

§ 1854. — **special agreement.**— Where it is agreed between the United States and owners of captured property that a suit then pending for its recovery shall be dismissed, the property sold and the proceeds invested in United States bonds and deposited in a certain bank to be delivered to the party entitled to the same, as determined by the judgment of this court, and the owners bring suit according to the agreement, and establish their right to recover, the judgment of the court will follow the agreement and direct the balance of the fund, after deducting the necessary expenses, to be paid to the owners. *Rothchild v. United States*,* 6 Ct. Cl., 204.

§ 1855. — **petition making a case of trespass only.**— A petition which does not in terms seek relief under the “Abandoned or captured property act,” but which alleges that the “United States illegally, violently and forcibly took possession” of the claimant’s plantation in Louisiana, in October, 1862, “whom they dispossessed, and continued to hold possession thereof until January, 1866, on the false and illegal pretext that the property was abandoned by the owner; and that certain personal property on it was destroyed or taken and carried away by the United States and the agents who were put in charge of the plantation, so that the petitioner has been and still remains entirely deprived of it, and the United States have become liable in law,” etc.; and that during the time “the plantation was in possession of the United States it was rented out by the United States to persons who made large crops of sugar and molasses,” which were worth \$30,000, and which the United States are justly and legally liable to pay him, contains only the elements of a declaration in trespass *quare clausum fregit*, with allegations of special damage as to the personal property destroyed, and the crops made and carried away; and is not within the jurisdiction of this court. *Pugh v. United States*,* 5 Ct. Cl., 113.

§ 1856. — **loyalty.**— A voluntary connection with the violation of the blockade laws, and heavy investments in the stocks of companies designed to violate those laws, and to give aid and countenance to the rebellion, will disable a claimant to maintain a suit in this court under the “abandoned and captured property act” of March 12, 1863. *Bates v. United States*,* 4 Ct. Cl., 569.

§ 1857. The court of claims decided that claims against the United States under the abandoned and captured property act (March 12, 1863), which requires proof of loyalty in the claimant, might be upheld if the claimant took the benefit of the amnesty act. Subsequently congress passed an appropriation bill which contained a clause providing that no evidence of a claimant having taken the benefit of the amnesty act should be admitted in the court of claims to support the loyalty of the defendant. *Held*, that this provision was an infringement of the judicial power; that it in effect required the court to decide certain cases in a certain way, and was void. *United States v. Klein*, 13 Wall., 145.

§ 1858. **Property taken by the army or navy.**— The jurisdiction of the court of claims does not include claims arising from the taking of property by the army or navy. So where property was used by the army under a contract which was null and void, the claim was not within the jurisdiction of the court. *Filor v. United States*, 9 Wall., 45.

§ 1859. **Claim for vessel destroyed while used as a gun-boat.**— Where the claimant tendered his steamer for the use of the United States, and it was received with the intention of shortly returning it to the claimant, but was kept for use as a transport, and afterwards as a gun-boat, in which latter use it was destroyed, *held*, that this was not a case of land capture, maritime prize or tortious taking, and that the claimant was entitled to a full hearing on the merits. *Radovich v. United States*,* 5 Ct. Cl., 541.

§ 1860. **Loss of property by bombardment of town by navy of United States.**— A claim for the loss of property caused by the bombardment of a town by the naval forces of the United States is not of itself a claim within the jurisdiction of the court of claims. *Perrin v. United States*,* 12 Wall., 315.

§ 1861. **Act of July 4, 1864, relating to destruction of property by army and navy during the rebellion.**— The jurisdiction of the court of claims over claims arising from the destruction of property by the army and navy during the rebellion is abrogated by act of congress of July 4, 1864. 13 Stat. at Large, 381. Claims then pending in that court can have no further hearing there, but must seek some other forum. *Corbett v. United States*,* 1 N. & H., 139.

§ 1862. This jurisdiction is not restored as to claims for steamboats appropriated by the joint resolution of 1869 (December 23), as that resolution affects solely the settlement of such claims by the officers of the treasury department. *United States v. Kimbal*, 13 Wall., 645.

§ 1863. The act of congress of July 4, 1864, which provides that the court of claims shall not have jurisdiction of claims against the United States for appropriation of property by the army during the suppression of the rebellion, does not take from that court jurisdiction

of a claim against the United States for the temporary use of steamers engaged in transporting portions of the army to different places. *United States v. Russell*, 13 Wall., 630.

§ 1864. The act of congress of July 4, 1864, above referred to, does take away jurisdiction from the court of claims of a claim founded upon the occupation of a plantation during the war by the United States officials, on the ground that it had been abandoned by its rebel owner, and the leasing it by those officials to various parties during that time. *Pugh v. United States*, 13 Wall., 635.

§ 1865. Act of congress of July 4, 1864 (13 Stat. at Large, 381), does not include a claim for use of a building by the civil service of the federal government during the rebellion. *Clark v. United States*,* 1 N. & H., 145.

§ 1866. Where money seized by the army comes into the possession of the government, it is not property appropriated by the army within the meaning of the act of July 4, 1864, and this court has jurisdiction of a suit to recover it. *Pennsylvania Co. v. United States*,* 7 Ct. Cl., 401.

§ 1867. Certain cattle and hay having been taken from the claimant's farm during its occupation by federal cavalry, the quartermaster gave the claimant a certificate reciting the receipt of the property, and declaring that "the owner will be entitled to be paid for the same after," etc. The claimant proved no act of his own by which the defendants acquired the property. *Held*, that it was an appropriation by the army within the meaning of the act of July 4, 1864, and that a suit on such certificate was not within the jurisdiction of this court. *Patterson v. United States*,* 6 Ct. Cl., 40.

§ 1868. Certain stores in Memphis were seized by the military and occupied as a hospital. After they had been so occupied for a year the quartermaster agreed verbally to pay rent for them, and rent was so paid, though not to the full value of the property. *Held*, that they were occupied under a contract, and not by virtue of an appropriation by the army, and that this court had jurisdiction of a suit for the balance of the rent due after the agreement. *Held*, also, that repairs, etc., necessitated by the alterations made in the buildings to fit them for use as a hospital, although made prior to any agreement to pay rent for them, were not damage done by the army within the meaning of the act of July 4, 1864, and that the value of those repairs could be recovered in this court. *Provine v. United States*,* 5 Ct. Cl., 455.

§ 1869. When a vessel, carrying freight for the government to a southern port under a contract, is compelled by the quartermaster stationed there to proceed elsewhere with her cargo, against the protest of her captain, but is not taken from the custody of her captain and crew, such enforced service is an impressment of the vessel within the acts of March 3, 1849, and March 3, 1863, and not an "appropriation" of the vessel within the meaning of the act of July 4, 1864, and the owner is entitled to recover for an injury to the vessel from a marine casualty, which has been induced by the specific interference of the quartermaster with the navigation of the vessel; for such injury is not "damage" done by the army within the meaning of the last mentioned act. *Kimball v. United States*,* 5 Ct. Cl., 252.

§ 1870. A hotel situated in Georgetown, District of Columbia, was taken by a United States quartermaster, under the orders of the military governor of the military district of Washington, for a military hospital, and used as such. The quartermaster-general paid rent for it, but not its full value. *Held*, that the war department having treated it as property held under an implied lease, this court could not regard it as property appropriated by the army, within the meaning of the act of July 4, 1864, and that the claim for the balance of the rent was within the jurisdiction of the court. It seems, however, that, under any circumstances, the property, being situated in a loyal state, would be deemed taken under an implied contract. *Waters v. United States*,* 4 Ct. Cl., 389.

§ 1871. Where a quartermaster impresses a steamer into the service of the United States, and during such time she is manned, equipped and managed under the authority and at the expense of the owner, the quartermaster paying for the services in part, and, at the expiration of the period of her use, returning her to the owners, such a taking and use is not an appropriation of property by the army, within the meaning of the act of July 4, 1864, and this court has jurisdiction of a claim for the steamboat's services. *Russell v. United States*,* 5 Ct. Cl., 121.

§ 1872. The United States having need of some sand for building purposes, the quartermaster, whose duty it was to procure it, obtained permission from the claimant to take it from his land [this land was near Nashville, Tennessee], promising him compensation for it. The sand was taken by the United States, and a voucher made out for the agreed price. *Held*, that these acts of the quartermaster were mere acts of politeness, and that the taking of the sand was an appropriation of property by the army or navy within the meaning of the act of July 4, 1864, and that this court had no jurisdiction of the claim. *Lindsley v. United States*,* 4 Ct. Cl., 359.

§ 1873. The United States military forces seized and occupied certain premises in Memphis during the war. After the close of the war they continued to occupy the premises. *Held*,

that a claim for rent for the occupation subsequent to the war was a claim "growing out of the appropriation of property by the army," within the meaning of the act of July 4, 1864, and as construed by the act of February 21, 1867, and therefore without the jurisdiction of this court. *Bishop v. United States*,* 4 Ct. Cl., 448.

§ 1874. This court does not have jurisdiction of a claim for the use of premises in Memphis, occupied by the quartermaster during the war, without any valid agreement to pay rent, or any acknowledgment that rent is due; for such use is an appropriation of property by the army within the meaning of the act of July 4, 1864. *Ayres v. United States*,* 3 Ct. Cl., 1.

§ 1875. A steamer belonging to the claimant came into the hands of the quartermaster after the capture of Charleston, and was then used by him. No contract was made with the claimant for its hire by the quartermaster, or any officer who had authority to contract. The quartermaster never recognized the claimant's right to hire, but always treated the steamer as captured property; and it was sold as such by the treasury department. *Held*, that it came within the meaning of the act of July 4, 1864, taking away the jurisdiction of this court where the property was appropriated by the army or navy; and the petition was dismissed. *Slawson v. United States*,* 4 Ct. Cl., 87.

§ 1876. A claim for the use and occupation of a certain building in Washington, seized by the military governor of the District of Columbia for the use of the quartermaster-general, and used exclusively by the clerks in his office, is not a claim for property appropriated by the army within the meaning of the act of July 4, 1864, and is therefore within the jurisdiction of this court. *Clark v. United States*,* 1 Ct. Cl., 145.

§ 1877. Where there are several claimants of the same property.—Where several claimants are seeking to recover by several actions the same proceeds of property, whereof each claims to have been the owner, the court will, on these facts being properly brought before it on motion, determine the different cases in one suit. *Woodruff v. United States*,* 4 Ct. Cl., 486.

§ 1878. Where the secretary of war transmitted two claims for the rent of the same premises to the court of claims under the act of June 25, 1868, and it appeared that, considered alone, the court had jurisdiction of each claim, the court refused to consider a plea to the jurisdiction, on the ground that the case involved a question of title between the claimants, the objecting claimant not having yet filed his petition in obedience to the citation with which he had been served. *Bright v. United States*,* 6 Ct. Cl., 118.

§ 1879. When a case has been transmitted to this court under the act of June 25, 1868, because the claim was for rent which was claimed by two parties, and one of these parties appears and presents his petition, but the other does not appear, and when cited only appears to object to the jurisdiction, it is not sufficient, to entitle the claimant appearing to judgment, that the government makes no defense; he must still present sufficient proof to make out a *prima facie* right to the rent himself. *Bright v. United States*,* 8 Ct. Cl., 326.

§ 1880. Conflict of right between guardian and tutor.—This court is national in its jurisdiction, and a guardian, executor or administrator of any state may maintain a suit in it. But when there is a conflict of right between a guardian appointed in one state and the tutrix appointed in another, the court will give preference to the one appointed in the state where the ward is domiciled. *Stanton v. United States*,* 4 Ct. Cl., 456.

§ 1881. Reference of accounts.—Although the court of claims must hear and decide all cases itself, yet it may exercise the same powers as other courts, and in cases of complicated accounts may refer the same to a special commissioner to adjust, and then adopt his report, after examination, as its own decree. *Intermingled Cotton Cases*, 2 Otto, 653.

§ 1882. When a claimant is entitled to recover, but the amount of his claim cannot be determined by the court from the evidence, it will be referred to a commissioner to take further proofs as to the amount due. *Sickels v. United States*,* 1 Ct. Cl., 214.

§ 1883. Vacation of commission of commissioner.—The commission of a special commissioner will be vacated by the court on its own motion whenever it appears that he is a person of bad character. *Martin v. United States*,* 3 Ct. Cl., 384.

§ 1884. Report of equitable claim to congress.—The court of claims will, when the case shows an equitable claim, report the facts to congress, together with a bill to be acted on by congress as it shall think proper. *Lindsay v. United States*,* 19 Law Rep., 21.

§ 1885. Right of trial by jury.—The act of congress which gives jurisdiction to the court of claims empowers it to give a final judgment in any case, with a right of appeal. This act is not in opposition to the seventh amendment to the federal constitution, which provides that in suits at common law, where the value in controversy exceeds \$20, the right of trial by jury shall be preserved. A suit in the court of claims is not, in that sense, a suit at common law. *McElrath v. United States*, 12 Otto, 439.

§ 1886. Rule establishing additional jurisdictional requirement.—A rule of the court of claims requiring that, when the case is such as is ordinarily settled in any executive depart-

ment, the petition should show that application for its allowance had been made to that department, and without success, and its decision thereon, establishes an additional jurisdictional requirement which congress has alone power to impose, and is therefore unauthorized and void. *Clyde v. United States*, 13 Wall., 38.

§ 1887. **Reformation of contract.**—Under the statute of August 4, 1876, the court of claims has jurisdiction as a court of equity to reform a contract. *Harvey v. United States*, 15 Otto, 689.

§ 1888. **Determining amount of claim.**—The court of claims not only has jurisdiction to decide whether a claimant has a right to be paid his claim against the United States, but also what is the precise amount due to him. *United States v. Anderson*, 9 Wall., 71.

§ 1889. **Quantum meruit.**—Under the practice of the court of claims a judgment may be rendered for the value of property or services, although there is no *quantum meruit* count in the petition. *Clark v. United States*, 5 Otto, 543.

§ 1890. **Want of parties — Power to cause others to be made parties.**—The court of claims has not power to make a decision upon a case when only a part of the parties interested are before it, nor has it power to cause others interested to be made parties. *Hale v. United States*, * Dev., 137.

§ 1891. **Misjoinder of parties.**—Where an amended petition shows that only two out of the three plaintiffs are interested in the claims set up, the court will dismiss the petition for misjoinder of parties. *Parish v. United States*, * 1 Ct. Cl., 345.

§ 1892. **Citation compelling others claiming an interest to appear.**—Where an action directly relates to evidences of debt in the possession of third parties, in which they profess to have a legal interest, the claimant may take a citation requiring them to appear so as to formally notify them of the pendency of the suit, that the claimant may not be thereafter hindered in the prosecution of the suit by their unreasonable appearance and interposition. But the service of the citation will not bring any of the parties served, whether citizen or alien, within the authoritative jurisdiction of the court, so as to enable it to give judgment against him should he fail voluntarily to come in and prosecute his cross-action. *State of Texas v. United States*, * 7 Ct. Cl., 301.

§ 1893. **Where a state is co-defendant.**—The court of claims has no jurisdiction of actions where a state is impleaded with the United States as co-defendant. *Milwaukee & Rock River Canal Co. v. United States*, * 1 N. & H., 188.

§ 1894. **Jurisdiction prior to 1863.**—Before its reorganization by the act of March 3, 1863, this court sat only to determine questions of law and fact, which were to be passed upon by congress, and therefore had no adequate remedy to give. *Reeside v. United States*, * 2 Ct. Cl., 1.

§ 1895. **Judgments of court of claims prior to 1863.**—The judgments of the court of claims prior to its reorganization by act of congress of March 3, 1863, were not final decrees until approved by congress, nor could action be brought on them as such. *Nourse v. United States*, * 2 N. & H., 216.

§ 1896. **Prior to the act of March 3, 1863, reorganizing this court, its decisions had not the force of judicial decrees or judgments.** Therefore a finding of this court before that act in favor of the claimant, reported by the court to congress and still pending in congress, is no foundation for a claim in this court, and the petition must be dismissed. *Ibid.*

§ 1897. **Former adjudication.**—Where a former action was simply for the wrongful occupation of certain premises by the defendants, and the declaration did not show that the premises were a portion of a permanent Indian reservation, nor that the Indian title had never been divested, and had been expressly reserved by treaty; and the nominal defendant did not come in and set up either the title of the United States or that of the Indians, *held*, that the judgment in the former action would not estop the defendants from setting up the Indian title in the present suit, although the nominal defendant in the former action had appeared in the case by their direction. *Langford v. United States*, * 12 Ct. Cl., 338.

§ 1898. **After the court of claims has decided adversely to the claimant, he cannot maintain a second action for the same cause, although the supreme court has held the doctrine of the first decision erroneous, and the claimant had no right of appeal.** The first judgment, standing unvacated and unreversed, if pleaded by the defendants, is a bar to the second action. *Osborn v. United States*, * 9 Ct. Cl., 153.

§ 1899. **The estoppel of a judgment, rendered on the merits, whether on demurrer, agreed statement of facts or verdict, extends to every material allegation or statement, which, having been made on one side and denied on the other, is at issue in the cause, and is determined in the course of the proceedings.** But where the cause of action in the second suit is not only different from the cause of action in the first suit, but could not have been tried, as not within the scope of the pleadings, the judgment in the first suit will be no bar. Hence a judgment in a suit for the non-delivery of supplies to be transported is no bar to a second action to recover for the price of transportation of supplies actually delivered to be transported. *Shrewsbury v. United States*, * 9 Ct. Cl., 263.

§ 1900. Where a suit is prosecuted in the name of W., but to the use of G., who is the assignee of the claim and the real party in interest, under the rule of law that all privies to the suit are bound by the judgment, no second action can be brought by G. for the same cause of action. *Gill v. United States*,* 7 Ct. Cl., 522.

§ 1901. *Res adjudicata* by another court.—A judgment of a court of the United States or of a state concludes the court of claims in the same matter. *Reeside v. United States*,* Dev., 85, 219.

§ 1902. Judgment in circuit court against the government by way of set-off.—In an action in the circuit court by the United States against this claimant, the defendant having pleaded a set-off, the court gave judgment that the United States take nothing by their bill, and that the claimant is entitled to the balance found due him by the jury. *Held*, in a suit in this court to recover that balance, that the judgment of the circuit court was final and conclusive on this. *Tillon v. United States*,* 1 Ct. Cl., 220.

§ 1903. The judgment of a prize court, allowing certain bills for services in weighing and gauging the cargoes of certain prizes, is a judicial determination of the validity of the claims, and cannot be reviewed or questioned in this court. And the order of the prize court, making the claims payable out of "the fund for defraying the expenses of suits in which the United States is a party or interested," under the act of June 30, 1864, is conclusive, and there appearing nothing in the way of the payment of the claim on the order of the prize court, there is no reason for resorting to the court of claims. *Root v. United States*,* 5 Ct. Cl., 408.

§ 1904. Decision of *ex parte* tribunal.—The proceedings of an *ex parte* commission, appointed by the secretary of war to examine and report upon certain claims, having no final powers, and to which the claimants were practically obliged to submit their claims, do not constitute an arbitration, and are not binding on this court. *Reeside v. United States*,* 2 Ct. Cl., 1.

§ 1905. Settlement of claim by commission.—When there is a dispute between a contractor and the government, and his claim is referred to a commission to settle, which, after full investigation, and a patient hearing given to the claimant, fix the basis on which his account is to be settled, and this basis is adopted and the claimant receives the money under it, this will be held a full settlement of his claim, and he cannot afterwards sue in the court of claims for the balance due under his contract. *United States v. Justice*, 14 Wall., 535.

§ 1906. Award made under act of congress.—An award made by an arbitrator, to whom by act of congress the claim had been referred, and accepted by the claimant, is binding on the claimant, and cannot be afterwards opened in this court on the ground that the award made was not according to the submission. *Gilbert v. United States*,* 1 Ct. Cl., 108.

§ 1907. A decision of the board of commissioners for adjudicating upon claims against Spain, under treaty of February 22, 1819, is final, and does not allow of an appeal to the court of claims. *Thomas v. United States*,* Dev., 29.

§ 1908. The United States, by treaty with Spain of 1819, in return for the cession of Florida, gave up the claims of her own citizens against Spain. A special commission was appointed to investigate these claims and adjust them. The commission rejected this claimant's claim. *Held*, that the commission was a special tribunal from whose decision there was no appeal; and that this court had no power to overturn or disregard that decision, although it was erroneous; and that, therefore, this petition must be dismissed. *Meade v. United States*,* 2 Ct. Cl., 224.

§ 1909. Decision on land warrant by commissioner.—When a decision on a land warrant is made by the commissioner, this decision is final only as regards the executive department, and does not prevent a suit in the court of claims. *Alire v. United States*,* 1 N. & H., 234.

§ 1910. Claim settled by congress.—The court of claims has no jurisdiction of a claim for the settlement of which a special act of congress has been passed and a sum found due and paid to the claimant. *Gay v. United States*,* Dev., 61.

§ 1911. Review of judicial decision of officer.—When an accounting officer acts simply in a ministerial capacity, his decisions may be reviewed in this court; but when he acts in a judicial or *quasi* judicial capacity, either as an arbitrator or as a special tribunal invested with the sole jurisdiction of the claim, his award is final. Hence, where congress referred a claim to the postmaster-general to "adjust and settle" on "the affidavits and proofs on file in the house of representatives," and the consideration of this testimony, in the opinion of the court, implied an exercise of judicial discretion, the court held that his award was final; though whether as an award of an arbitrator or as the decision of a special tribunal, clothed with exclusive jurisdiction of the case, they said had not yet been decided. *Chorpenning v. United States*,* 3 Ct. Cl., 140.

§ 1912. Decision of officers in money claims.—In cases of money claims it does not oust or affect the jurisdiction of this court that the accounting officers, or even the head of a de-

partment, has decided that the claimant was not entitled to be paid. *Bogert v. United States*,* 3 Ct. Cl., 18.

§ 1913. **Review of decision of postmaster-general.**—The court of claims has no power of review over decisions of the postmaster-general, in the exercise of his judicial discretion. *Buckles v. United States*,* 20 Law Rep., 630.

§ 1914. **When accounting officers refuse to act under statute.**—The court of claims may review the construction given to a federal statute by the accounting officers of the treasury, when they refuse to act under it. *Wigg v. United States*,* Dev., 48.

§ 1915. **Suit by assignee.**—Claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the court of claims. *United States v. Gillis*, 5 Otto, 417; *Sines v. United States*,* 1 Ct. Cl., 12.

§ 1916. One to whom a voucher has been made by an Indian agent at the request of the vendor of certain chattels purchased by the agent is at best but an assignee of the claim, and as such cannot maintain an action on the voucher in this court. *Johnston v. United States*,* 13 Ct. Cl., 217.

§ 1917. The assignee of property destroyed more than a year before the assignment cannot maintain a suit in his own name for its value in this court. *Wiggins v. United States*,* 2 Ct. Cl., 345.

§ 1918. Pending an action in this court by two partners to recover damages for the breach of a contract of sale by the government, one assigned all his claim to the other. *Held*, that the assignment was illegal under the act of 26th of February, 1853, and that the assignee could not prosecute the suit alone. *Cooper v. United States*,* 1 Ct. Cl., 85.

§ 1919. There is no objection to the assignor and assignee of a claim suing together under the abandoned or captured property act, the petition, which is implied by the oath of the assignor, alleging the assignment and that the suit is for the use of the assignee. *Tebbits v. United States*,* 5 Ct. Cl., 607.

§ 1920. When a suit is brought in the name of the assignor of a claim, for the use of the assignee, it is necessary to connect the assignor with the case, either by his verifying the petition, or by the warrant of attorney required under rule II, or by proving the transfer. *Silverhill v. United States*,* 5 Ct. Cl., 610.

§ 1921. A suit is begun by an assignor for the benefit of his assignee. He dies *pendente lite*. His executrix files an amended petition, which states the transfer. This amended petition is verified by her. *Held*, that the assignor was sufficiently connected with the case. *Pullin v. United States*,* 7 Ct. Cl., 507.

§ 1922. When an action is brought by an assignor for the use of several assignees, and it is not apparent on the proofs what the respective interests of the assignees are, the court will not dismiss the claim, if otherwise valid, for the defendants are to be regarded in this court as seeking a decision on the merits, and as no costs are awarded they would take nothing by a new suit; but the court will refer the matter to a commissioner for further hearing as to the amount of each assignee's claim, and suspend judgment till the coming in of his report. *Crowell v. United States*,* 6 Ct. Cl., 23.

§ 1923. — **equity jurisdiction.**—After reviewing the different decisions under the abandoned and captured property act, in which the United States had been likened to a trustee, and those in which the court had heard different claimants of the same fund in one suit, the court held that, as it had not by any judicial act assumed authority to judge of the equities between a citizen and the government, or to entertain a suit against the government on equitable considerations, it would not decide the question whether it had any equity jurisdiction, the decision not being necessary under the circumstances. The facts of this case were as follows: A., holding a claim against the United States, assigned it to B., who commenced a suit for it in A.'s name. Pending this action A. became insolvent, and his assignee assigned the claim to C., who moved in the suit by B. to be admitted as the claimant, and to prosecute the claim in his own name. *Held*, that under the bankrupt act he was the holder of the legal title, and that his motion must be granted. *Burke v. United States*,* 13 Ct. Cl., 231.

§ 1924. **Right of alien to sue in court of claims.**—Under the act of July 27, 1868, section 2, an alien is entitled to maintain a suit in this court if a citizen of the United States have the legal right, according to the forms of procedure of the government of such alien, to prosecute in such government's courts, to judgment against it, a claim which, if the case arose under this government, he could, under the same circumstances, prosecute to judgment against the United States. So held where a citizen of France having sued in this court, it appeared that by the French law American citizens could sue the French government for real or personal property detained by it, subject only to giving security, and the court decided that such citizen could sue in this court. *Rothschild v. United States*,* 6 Ct. Cl., 204.

§ 1925. By immemorial usage there is accorded to Spanish citizens, and to aliens as well,

the right to prosecute suits against the Spanish government in the judicial tribunals. The judgments of these tribunals are conclusive, and are satisfied by being inserted in the budget, when they are paid by the treasurer or paymaster as a matter of course, without further legislative action. *Held*, that the Spanish government accords to citizens of the United States the right to prosecute claims against such government in its courts within the meaning of the act of July 27, 1868. *Molina v. United States*,* 6 Ct. Cl., 269.

§ 1926. **Limitation.**—In the case of the sale of beef, the statute of limitations provided by the amended court of claims act begins to run from the time when the goods were delivered and the price became payable, and not from the time when the executive department disallowed the claim. *Battelle v. United States*,* 7 Ct. Cl., 297.

§ 1927. In actions under the act of May 9, 1866 (R. S., §§ 1059, 1062), for relief from responsibility for loss of funds captured while in the line of duty, and for which the party is held responsible, the statute of limitations does not begin to run so long as the United States delays to enforce its claim; for it is in reality a suit to establish a defense, and so long as the defense can be raised so long should the action lie in the court of claims. But, at all events, in this case, as the loss was not disallowed by the accounting officer as a credit till within six years of the commencement of this suit, the statute constitutes no bar. *United States v. Clark*,* 10 Ch. Leg. N., 244.

§ 1928. Where a new suit under the abandoned or captured property act would be barred by the limitation prescribed by that act, the court will allow an existing suit, brought by a wife alone, to be amended by adding the husband as co-claimant. *Green v. United States*,* 7 Ct. Cl., 496.

§ 1929. To save a right of action from being barred by the statute of limitations, which would be the case were a new action to be brought, the court will allow the assignor to be substituted for the assignee in an action pending, and the same action to proceed in the name of the assignor to the use of the assignee. In this case the action was to recover the proceeds of captured property. *Payan v. United States*,* 7 Ct. Cl., 400.

§ 1930. The statute of limitations of March 3, 1863, section 10, barring all actions on claims against the United States unless suit is begun within six years after the claim first accrues, does not begin to run until there is a person in existence who is qualified to sue upon the right. Hence, where the claim of a contractor did not accrue till after his death, and no personal representative was then appointed, *held*, that the statute did not begin to run until such appointment was made; and the appointment having been made within three years of the time when suit was begun, the claim was not barred, although the statute provides that no other disability than those enumerated should prevent the claim from being barred, for the statute only refers to personal disabilities, not to the want of a party capable of suing. *Fulenweider v. United States*,* 9 Ct. Cl., 403.

§ 1931. **Evidence.**—On all questions touching the competency or relevancy of testimony in this court, the principles which govern courts of law shall be maintained. *Hughes v. United States*,* 4 Ct. Cl., 64.

§ 1932. Under the act of June 25, 1868 (§ 1079, R. S.), the rule of evidence in the court of claims is the old common law rule. Hence, under this act, a claimant is a competent witness to prove the contents of a package or trunk, in regard to which his right, title and claim to relief for its loss has been already established by other evidence. *United States v. Clark*,* 10 Ch. Leg. N., 244.

§ 1933. The vendor of property, which was seized and confiscated after the sale and delivery to a third person for the use of the claimant, is not rendered an incompetent witness by the act of June 25, 1868; to render a party incompetent under that act he must be the claimant or plaintiff of record, interested in the suit, or the person through whom the actual claim in suit was derived. *Grossmeyer v. United States*,* 4 Ct. Cl., 1; *Anderson v. United States*,* 4 Ct. Cl., 467.

§ 1934. Where an agent purchased cotton during the war without authority, and before his purchase was ratified the cotton was seized by the United States troops, the court held that the legal title was in the agent at the time of seizure, and that he was not a competent witness for the claimant in a suit against the government under the act of June 25, 1868. *Stoddard v. United States*,* 4 Ct. Cl., 511.

§ 1935. The trustees of a religious corporation are not persons from whom the claimant derives his title, or interested in such title, claim or right, within the meaning of the act of June 25, 1868, excluding such persons from testifying in support of any such title, claim or right. Congress did not intend this statute to extend beyond claimants prosecuting suits in their own names or for their own advantage, and persons who take a direct pecuniary or material advantage from the result. *Hebrew Cong. v. United States*,* 6 Ct. Cl., 241.

§ 1936. Testimony of the claimant taken before the act of June 25, 1863, cannot be used in this court by either the claimants or defendants. The only mode in which the United States

can use the claimant's testimony is by examining him as a witness under section 8 of the act of March 3, 1863. *Hubbell v. United States*,* 4 Ct. Cl., 37.

§ 1937. A claimant is not permitted to testify in his own behalf in the court of claims. *Jones v. United States*,* 1 Ct. Cl., 383; *McKee v. United States*,* 1 Ct. Cl., 336.

§ 1938. Under rule XXII of the court of claims, vouchers signed by persons claiming to be military officers, but whose official character seems disputed by the war department, and is not shown, are not competent evidence. *Seeberger v. United States*,* 4 Ct. Cl., 405.

§ 1939. The testimony of the claimant alone is not sufficient to support his claim, especially where it appears from such testimony that there are disinterested parties cognizant of the facts. *Pattee v. United States*,* 3 Ct. Cl., 397.

§ 1940. The claimant's oath is not evidence in this court of the value of his property which had been illegally seized by the government. *Brooke v. United States*,* 2 Ct. Cl., 180.

§ 1941. This court is not bound to accept irrelevant and incompetent testimony simply because it has been presented to congress, and printed by congress as part of the record, and transmitted here as part of the case. *Clark v. United States*,* 1 Ct. Cl., 246; *McKee v. United States*, 1 Ct. Cl., 336.

§ 1942. Objections to the form and manner of taking testimony cannot be made at the beginning of the trial if the party objecting had an opportunity of making them before. So held where the government attempted to impeach the credibility of a deponent, having had two opportunities to cross-examine him on the subject. *Hughes v. United States*,* 4 Ct. Cl., 64.

§ 1943. Where a witness has been examined by the claimant and cross-examined by the government, the latter will not be allowed to re-examine him by direct interrogatories on the identical subject-matter of its cross-examination, especially when it appears that his testimony had been given when he claimed to be assignee, a claim since then excluded by the court, and that the present effort on the part of the government may spring from an offer on the part of the witness to testify so as to defeat the claim altogether. *Atocha v. United States*,* 6 Ct. Cl., 95.

§ 1944. On a claim for land belonging to claimant under the donation act, and seized by the United States army officers as a military reservation, it was held that acts and declarations of the war department subsequent to the institution of the suit, indicating a determination to adopt it as a military reservation, were not admissible in evidence. *Johnson v. United States*,* 2 Ct. Cl., 39.

§ 1945. A commissioner who brings a suit for relief from liability for money lost by capture under the disbursing officers' act of May 9, 1866, cannot testify in his own behalf, the government having been in no fault, on the ground that his is the only testimony the circumstances can furnish. *Christian v. United States*,* 7 Ct. Cl., 431.

§ 1946. **Pleading.**—The court of claims is not bound by any special rules of pleading, *e. g.*, that a contract made with two must be prosecuted in their joint names. *United States v. Burns*, 12 Wall., 254.

§ 1947. In order to maintain a suit in this court the petitioner must allege and prove that he has made an application to the proper department to have his claim adjusted. *Calkins v. United States*,* 1 Ct. Cl., 382.

§ 1948. An allegation in a petition, that an application has been made for payment "to the proper department," is not a sufficient compliance with rule II of this court, which requires that "the petition set forth a full statement of the claim, and of the action thereon . . . by any of the departments." Also, that "in every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made to that department, and without success, and its decision thereon." *Clyde v. United States*,* 5 Ct. Cl., 134.

§ 1949. The verification of the petition required by the act of March 3, 1863, reconstructing this court, is not essential to give the court jurisdiction of the case; and a petition which has not been verified as required may be amended. *Griffin v. United States*,* 13 Ct. Cl., 257.

§ 1950. **Averment of loyalty.**—The jurisdiction of this court depends upon the allegations that the claimants and all former owners of the claim have at all times borne true allegiance to the government, etc., and have not in any way voluntarily aided or abetted or given encouragement to rebellion against the government. The allegations are traversable, and if found against the claimants, their case, so far as this court is concerned, is at an end. *Peirce v. United States*,* 1 Ct. Cl., 195.

§ 1951. An averment of loyalty in a petition to this court is a material allegation, without which the petition must be dismissed. *Brockett v. United States*,* 2 Ct. Cl., 213.

§ 1952. **Amendments.**—It is not a matter of right in a claimant, without leave of the court, to amend his petition, and if a case has been remanded to the docket with merely a general leave to amend, it is not admissible for the claimant to file an amended petition without first

submitting it to the court and obtaining specific leave to file it. But when an order of court entered of record specifies, as in this case, the particular amendment allowed to be made, the order itself is a sufficient leave, authorizing the corresponding amendment to be made and filed, without further application to the court. *Shaw v. United States*,* 9 Ct. Cl., 301.

§ 1953. The provision of the judiciary act that no proceeding shall be quashed, etc., for any defect or want of form, except in case of demurrer specially setting forth the defect, but the court shall have power to amend all such imperfections and wants of form, applies to this court; and a petition will not be dismissed because a party has been joined as a claimant who has no interest in the subject-matter, but the court will allow it to be amended, dismissing such claimant. *Molina v. United States*,* 6 Ct. Cl., 269.

§ 1954. **New trial.**—The act of June 25, 1868, authorizing this court to grant a new trial where any fraud, wrong or injustice has been done the government, does not authorize it to do so for the failure to present evidence which might have been known to the former law officers of the government charged with the defense. *Silvey v. United States*,* 7 Ct. Cl., 305.

§ 1955. When evidence was known to the officers of the defendants at the time of trial, but was not offered, it is no ground for a new trial, under the act of June 25, 1868, that if it had been offered it might have constituted a valid defense, for the injustice, if any, was inflicted on the defendants by their own officers. *Child v. United States*,* 6 Ct. Cl., 44.

§ 1956. The act of February 24, 1855, establishing the court of claims, which forbids the granting of a new trial, except under such circumstances as by the rules of common law or chancery, in suits between individuals, would furnish ground for granting a new trial, applies to this court under its present organization; and a new trial will not be granted when, by the rules of common law or chancery, it would not be granted. *Deeson v. United States*,* 6 Ct. Cl., 227.

§ 1957. On a motion for a new trial under the act of June 25, 1868, *ex parte* testimony of the kind and character usually admitted by courts on the hearing of motions for new trial, making out a *prima facie* case, is sufficient. Hence it is not necessary for the defendants, on such a motion, to prove a bond by the subscribing witness; it is sufficient to show a reasonable probability that they can prove it on trial. *Ayers v. United States*,* 5 Ct. Cl., 712.

§ 1958. Concealing the guilt of having aided in the rebellion, when making proof of loyalty, is a fraud, wrong or injustice done the United States, within the meaning of the act of June 25, 1868, and upon a motion for a new trial by the defendants under that act, the court cannot try the case upon its merits, and the claimant cannot admit the disloyal acts and show extenuating circumstances or compulsion. *Tait v. United States*,* 5 Ct. Cl., 638.

§ 1959. An error in law, for which there existed a full measure of redress by way of appeal, is not a wrong or fraud on the defendants for which this court can grant a new trial under the act of June 25, 1868. The inconveniences of an appeal constitute no ground for the motion; and the failure to appeal, or prosecute an appeal, under a misapprehension of their legal rights, must be deemed the defendants' misfortune. *Ealer v. United States*,* 5 Ct. Cl., 708.

§ 1960. If a motion for a new trial in behalf of the government, under section 1088, Revised Statutes, be filed within the two years allowed by that section, the right to take such action survives the lapse of that period, and it is competent for the court to hear and determine the motion whenever it shall thereafter be properly brought up. *Belloq v. United States*,* 13 Ct. Cl., 195.

§ 1961. When the court of claims has dismissed a motion for a new trial under section 2, act of June 25, 1868, not on its merits, but because in their opinion they had no jurisdiction to entertain it, the proper remedy is *mandamus*; and if the government, in mistake of its remedy, has taken an appeal which has been allowed, the proper course is for one or the other party to move to dismiss the appeal; and after its dismissal for the government to move for a distinct *mandamus* to require the court of claims to proceed. *Ex parte Russell*, 13 Wall., 664.

§ 1962. — **after appeal.**—If, after an appeal is taken from the court of claims to the supreme court, the court below grant a new trial, the appeal should be dismissed. The supreme court cannot grant a writ of *certiorari* to bring the proceedings for a new trial before it, but after the decision on the new trial the whole proceedings may again be taken before the supreme court by appeal. *United States v. Young*, 4 Otto, 259; *Young v. United States*, 5 Otto, 643.

§ 1963. — **after affirmance on appeal.**—When the decision of the court of claims has been affirmed on appeal to the supreme court, the court of claims, under section 2 of the act of June 25, 1868, has jurisdiction to grant a new trial, notwithstanding the filing of the mandate of the supreme court. *Ex parte Russell*, 13 Wall., 664.

§ 1964. **Appeals to supreme court.**—Under the fifth rule of the rules regulating appeals from the court of claims, a party is not entitled to have the court find the fact to be as he

claims it, or if they do not, to bring the whole testimony into the supreme court to show that he was right. *Mahan v. United States*, 14 Wall., 109.

§ 1965. Under the rules of the supreme court, which require the court of claims to send up on appeals only "the ultimate facts or propositions which the evidence shall establish," "and not the evidence on which those ultimate facts are founded," the latter court cannot certify up evidence in the case, although the parties have agreed in writing that the evidence in the case should be certified to the supreme court on appeal. *Hubbell v. United States*,* 6 Ct. Cl., 53.

§ 1966. A decision of the court of claims upon a motion properly before it is not open to review in the supreme court. *Young v. United States*,* 24 Int. Rev. Rec., 346.

§ 1967. The United States has a right of appeal from an adverse judgment of the court of claims in all cases where that court is required by any general or special law to take jurisdiction of a claim against the United States and act judicially in its determination. *Vigo's Case*, 21 Wall., 650.

§ 1968. When the court of claims, on a claim embracing several items, rejects some but allows others, and the United States *alone* appeals, the supreme court will not consider the rejected items, except so far as may be necessary for a proper understanding of the item allowed; as the claimant by not appealing has declared himself to be content with the disposition of the case by the court of claims. *United States v. Hickey*, 17 Wall., 9.

§ 1969. The allowance of an appeal to the supreme court by the court of claims does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking its allowance can be made. *Ex parte Roberts*, 15 Wall., 384.

§ 1970. When an appeal is taken in vacation and allowed by the chief justice during vacation, the case is taken beyond the jurisdiction of this court, and the court cannot afterwards allow a motion to vacate the allowance of the appeal. *Nutt v. United States*,* 8 Ct. Cl., 185.

§ 1971. An appeal from the judgment of an inferior court is not subject to its discretion — it is the right of the party — and that court cannot limit or modify its legal consequences. Hence when an appeal is taken from this court to the supreme court the action is taken from the jurisdiction of this court, and transferred to the jurisdiction of the supreme court; and this court cannot afterwards vacate the appeal though on the parties' own motion. *Stern v. United States*,* 6 Ct. Cl., 280.

§ 1972. — *finding of facts by court of claims.*—The finding of the court of claims is regarded by the supreme court as a special verdict. The court of claims may be required to state whether or not a certain item is included in its finding, but not to set forth in its finding the elements of its award. The court of claims cannot assess damages by conjecture, but must have proof before it of the amount. *United States v. Smith*, 4 Otto, 218.

§ 1973. The findings of facts by the court of claims on cases submitted to it are final, like the verdict of a jury upon facts properly submitted to it, and will not be revised by the supreme court. *Ibid.*

§ 1974. When it does not appear upon what special elements of damages the court of claims awarded damages, the supreme court will not inquire into the question; nor is it error for the court of claims to omit to specify upon what items its finding is based. *Ibid.*

§ 1975. If the court of claims finds the facts of a case, and also sends to the supreme court on appeal the evidence on which its finding of one fact was based, and the supreme court sees that the evidence is wholly incompetent, it must reverse the finding of the court of claims. *United States v. Clark*, 6 Otto, 39.

VIII. TERRITORIAL, STATE AND OTHER COURTS.

1. *Territorial Courts.*

SUMMARY — *Powers of legislature over details*, § 1976. — *Laws of practice of federal courts*, § 1977. — *Power to mingle law and equity*, § 1978. — *General jurisdiction not to be conferred on territorial probate courts*, § 1979.

§ 1976. Under the organic act of Montana Territory, the legislature is intrusted with the regulation of the details of the jurisdiction and practice of the courts. *Hornbuckle v. Toombs*, §§ 1980-83.

§ 1977. Laws specifically regulating the practice of the federal courts do not apply to the territorial courts. *Ibid.*

§ 1978. It is competent for the courts of Montana, under sanction of their legislature, to mingle legal and equitable remedies in one proceeding. *Ibid.*

§ 1979. An enactment of the territorial legislature of Utah, conferring upon the probate courts general jurisdiction in matters civil and criminal, is in violation of the organic law, and is void. *Ferris v. Higley*, §§ 1984-88.

[NOTES.— See §§ 1989-2010.]

HORNBUCKLE v. TOOMBS.

(18 Wallace, 648-657. 1873.)

ERROR to the Supreme Court of the Territory of Montana.

STATEMENT OF FACTS.—Toombs brought suit against Hornbuckle for damages for diverting a stream of water, by means of which he was deprived of irrigation of his farm, and for an injunction against further diversion of the stream. There was a verdict in his favor for \$1, and that he was entitled to seventy inches of the water, and an injunction was awarded by the judgment of the court. The errors assigned were as to the intermingling of legal and equitable remedies.

Opinion by MR. JUSTICE BRADLEY.

The only errors assigned are based on the intermingling of legal and equitable remedies in one form of action.

Such an objection would be available in the circuit and district courts of the United States. The process act of 1792 (1 Stat. at Large, 275) expressly declared that in suits in equity, and in those of admiralty and maritime jurisdiction, in those courts, the forms and modes of proceeding should be according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, subject to such alterations and additions as the said courts respectively should deem expedient, or to such regulations as the supreme court should think proper to prescribe. The supreme court, in prescribing rules of proceeding for those courts, has always followed the general principle indicated by the law. Whether the territorial courts are subject to the same regulation is the question which is now fairly presented.

§ 1980. *Former decisions denying the right of territorial courts to mingle law and equity in one proceeding.*

In the case of *Orchard v. Hughes*, 1 Wall., 77, a majority of this court was of opinion that the territorial courts were subject to the same general regulations in equity cases which govern the practice in the circuit and district courts. That was the case of a foreclosure of a mortgage in the territorial court of Nebraska, and the court, under a territorial law, not only decreed a foreclosure and sale of the mortgaged premises, but gave a personal decree against the defendant for the deficiency. We had decided in *Noonan v. Lee*, 2 Black, 500, that under the equity rules prescribed for the circuit and district courts, such a decree could not be made. The majority of the court now applied the same rule in the case of *Orchard v. Hughes*, although it was decided by a territorial court. Following out the principle involved in that decision, we subsequently, in the case of *Dunphy v. Kleinsmith*, 11 Wall., 610, reversed a judgment of the supreme court of Montana, on the ground that the case (being in nature of a creditor's bill, filed to reach property which the debtor had fraudulently conveyed) was a clear case of equity, whilst the proceedings therein exhibited no resemblance to equity proceedings, there being a trial by jury, a verdict for damages, and a judgment on the verdict.

§ 1981. *Former decisions overruled. Construction of organic act of Montana Territory as to courts and their powers.*

On a careful review of the whole subject we are not satisfied that those decisions are founded on a correct view of the law. By the sixth section of the organic act of the territory of Montana, with which that of Nebraska substantially agreed, it was enacted "that the legislative power of the territory shall

extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act." By the ninth section it was provided "that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace," and that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be limited by law; *provided*," that "the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction."

Now, here is nothing which declares, as the process act of 1792 did declare, that the jurisdictions of common law and chancery shall be exercised separately, and by distinct forms and modes of proceeding. The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that congress intended them to be exercised in that way. But it is well known that in many states of the Union the two jurisdictions are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the circuit and district courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases it is difficult to see any good reason why an equitable right should not be enforced or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the states, and must be considered as having been well known to congress; and when the latter body, in the organic act, simply declares that certain territorial courts shall possess both jurisdictions, without prescribing how they shall be exercised, the passage by the territorial assembly of a code of practice which unites them in one form of action cannot be deemed repugnant to such organic act.

§ 1982. *Laws specifically regulating proceedings of the federal courts do not apply to the territorial courts.*

A clause in the thirteenth section of the act, however, has been referred to, by which it is declared "that the constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of Montana as elsewhere in the United States;" and it is argued that, by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of congress are imported into the practice of the territorial courts. But this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific application, and are, in truth and in fact, locally inapplicable to the courts of a territory. There is a law authorizing this court to appoint a reporter. In one sense this law is not locally inapplicable to the supreme court of the territory; but in a just sense it is so. The law has a specific application to this court, and cannot be applied to the territorial court without an evident misconstruction of the true meaning and intent of congress in the clause of the thirteenth section above referred to. That clause has the effect, undoubtedly, of importing into the territory the laws passed by congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application, but not those of specific application.

The acts of congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the federal system, and as invested with the judicial power of the United States expressly conferred by the constitution, and to be exercised in correlation with the presence and jurisdiction of the several state courts and governments. They were not intended as exertions of that plenary municipal authority which congress has over the District of Columbia and the territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective state courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

§ 1983. *Territorial legislatures have full general powers of the details of legislation, including the regulation of the practice and jurisdiction of courts.*

Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of congress to revise, alter and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature; and the jurisdiction of the territorial courts is collectively co-extensive with and correspondent to that of the state courts — a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state, courts are invested with plenary municipal jurisdiction.

It is true that the district courts of the territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the circuit and district courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties. Cases arising under the constitution and laws of the United States would be composed mostly of revenue, admiralty, patent and bankruptcy cases, prosecutions for crimes against the United States, and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable.

From a review of the entire past legislation of congress on the subject under consideration, our conclusion is, that the practice, pleadings and forms and modes of proceeding of the territorial courts, as well as their respective juris-

dictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of this state of things, congress has it in its power at any time to establish such regulations on this as well as on any other subject of legislation as it shall deem expedient and proper. The judgment is affirmed.

Dissenting opinion of JUSTICES CLIFFORD, DAVIS and STRONG.

We dissent from the judgment in this case for the reason that this court has several times decided that claims at law and claims in equity cannot be united in one action even in the territorial courts. And we think if a change in the rule is to be made, that it should be made by congress.

FERRIS *v.* HIGLEY.

(20 Wallace, 375-384. 1874.)

ERROR to the Supreme Court of the Territory of Utah.

STATEMENT OF FACTS.—Higley sued Ferris in a probate court in Utah, on a promissory note for \$1,000, and obtained judgment. This was reversed upon appeal to the supreme court of Utah, on the ground that the probate court had no jurisdiction of such cases.

Opinion by MR. JUSTICE MILLER.

The single question in this case is whether the probate court had jurisdiction to hear and determine such an action as it heard and determined in the present case; and this must be decided by a construction of the statute of the territory and the provisions of the act of congress organizing the territory. A statute of the territorial legislature enacts that "the several probate courts, in their respective counties, have power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment, and they shall be governed in all respects by the same general rules and regulations as regards practice as the district courts."

§ 1984. *By the words "have power," in an enactment defining the jurisdiction of courts, it is intended to confer the power in question.*

In a very learned opinion of one of the judges of the supreme court of the territory, we find an ingenious argument in support of the idea — though the case is not rested on this ground — that this provision was not intended to confer jurisdiction, but was a mere declaration of the opinion of the territorial legislature that the jurisdiction already existed. This is founded on the use of the words "have power" in the present tense, instead of "shall have power," in the future. We have no doubt that the legislature intended to *confer* the power by that sentence. No statute or other law existed previously by which any one ever supposed that such power existed. The form of expression here used is not at all uncommon for that purpose, especially in enactments which, like this, are parts of a general code of laws. The legislature was not in any manner called upon to give its opinion of the powers of the probate court, but it was in fact making a general system of laws for the territory. It is inconceivable that it meant anything else but to establish the court and prescribe its jurisdiction.

§ 1985. *Construction of the organic act establishing the territorial government of Utah.*

But the power of the legislature to confer this jurisdiction on the probate courts is a much more serious question. The organic act, in defining the power of the territorial legislature, declares that "it shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and with that act." We may, I think, assume, without much hazard, that defining the jurisdiction of a probate court, or, indeed, of any court, may be fairly included within the general meaning of the phrase rightful subject of legislation. Nor do we think there is anything in such legislation inconsistent with the constitution of the United States. There remains then only the further inquiry whether it is inconsistent with any part of the organic act itself. That act established a complete system of local government. It stands as the constitution or fundamental law of the territory. It provides for the executive, legislative and judicial departments of government. It prescribes their functions, their manner of appointment and election, their compensation and tenure of office. In regard to the judiciary, it creates the courts, distributes the judicial power among them, and provides all the general machinery of courts, such as clerk, marshal, prosecuting attorney, etc.

It is here, then, if anywhere, that we should look for anything inconsistent with the power conferred on the probate courts by the territorial legislature. The ninth section of the act declares that "the judicial power of the territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace," and it prescribes the organization and number of the district courts. The judges of these are appointed by the president, by and with the advice and consent of the senate of the United States. And then it declares that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law: Provided, that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundary of lands may be in dispute, or where the debt or sum claimed shall exceed \$100, and the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction." Provision is made in the same section for appeals and writs of error from the district courts to the supreme court of the territory, and from that court to the supreme court of the United States, but no provision is made for any such review of the decisions of the probate courts or of the justices of the peace.

§ 1986. *Jurisdiction and constitution of probate courts.*

The common law and chancery jurisdiction here conferred on the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. The jurisdiction of the justices of the peace is specifically limited as regards the moneyed value on which it may decide, and by the exclusion of matters concerning real estate. Of the probate courts it is only said that a part of the judicial power of the territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country. It is a tempting subject to trace the history of the probate of wills and the administration of the personal estates of decedents, from the time that it was held to be a matter of

exclusive ecclesiastical prerogative, down to the present. It is sufficient to say that through it all, to the present hour, it has been the almost uniform rule among the people who make the common law of England the basis of their judicial system, to have a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills. These tribunals have been variously called prerogative courts, probate courts, surrogates, orphans' courts, etc. To the functions more directly appertaining to wills and the administration of estates have occasionally been added the guardianship of infants and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject. Such courts are not in their mode of proceeding governed by the rules of the common law. They are without juries and have no special system of pleading. They may or may not have clerks, sheriffs, or other analogous officers. They were not in England considered originally as courts of record; and have never, in either that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful.

§ 1987. *Under the organic act of Utah territory it is not intended that probate courts may be made courts of general jurisdiction.*

Looking then to the purpose of the organic act to establish a general system of government, and its obvious purpose to say what courts shall exist in the territory, and how the judicial power shall be distributed among them, and especially to the fact that all ordinary and necessary jurisdiction is provided for in the supreme and district courts, and that of the justices of the peace, and that the jurisdiction of the probate court is left to rest on the general nature and character of such courts as they are recognized in our system of jurisprudence, is it not a fair inference that it was not intended that that court should be made one of general jurisdiction? that it should not be converted into a court in which all rights, whether civil or criminal, whether of common law or chancery cognizance, whether involving life, or liberty, or property, should be lawfully tried and determined? For all such cases, when tried in the district courts, provision is made for correction of errors and mistakes by appeal to a higher court. But no such provision is made in regard to the probate courts, a thing which certainly would have been done if it had been supposed that all judicial power would have been vested in them.

It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act, already cited, that the jurisdiction of the several courts therein provided for "shall be as limited by law." The argument is that this refers to laws to be thereafter made by the territorial legislature, and that, as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase, "as limited by law," we are wholly to exclude laws made by the legislature of the territory. There may be cases when that legislature, conferring new rights or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation.

§ 1988. *An act of the territorial legislature of Utah conferring general jurisdiction on probate courts is in violation of the organic law, and void.*

But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these territorial courts. The general history of our jurisprudence and the organic act itself are also to be considered, and any act of the territorial legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that act, and inconsistent with the clause which confers upon the supreme court and district courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the federal power, paid by that power—that other officers of these courts are appointed and paid in like manner,—strongly repels the idea that congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the territorial legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the territory.

The act of the territorial legislature conferring general jurisdiction in chancery and at law on the probate courts is therefore void. This view is supported by the decisions of courts of Kansas (*Locknane v. Martin*, *McCahon*, 60; *Dewey v. Dyer*, *id.*, 77; *Mayberry, Graham et al. v. Kelly*, 1 Kan., 116) on a similar statute; by decisions in Idaho (*The People v. DuRell*, 1 Idaho, 30; *Moore v. Konbly*, *id.*, 55), and by the decisions of the supreme court whose judgment we are here called on to reverse.

Judgment affirmed.

WAITE, C. J., took no part in the decision of this case.

§ 1989. **How far governable by their own regulations and those of the legislature.**—The practice, pleadings and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject to a few express or implied conditions contained in the act organizing the territory, were intended by congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. Hence an act uniting the equitable and common law jurisdiction of its courts is valid, and a territorial court may administer relief in both forms in one action. *Hornbuckle v. Toombs*, 18 Wall., 651; *Davis v. Bilsland*, 18 Wall., 659. See §§ 1976-78.

§ 1990. **Acquisition of new territory.**—Congress possesses the power to institute new courts in territory newly acquired by cession from a foreign government, and to transfer to such courts cases pending before the courts of that territory at the time of the cession. *Leitensdorfer v. Webb*, 20 How., 178.

§ 1990a. **Review by supreme court of judgment of court of territory since made a state.**—Judgment for the recovery of a quarter section of land was rendered in the district court of Iowa territory. By writ of error the case was carried to the supreme court of the territory and judgment affirmed. The territory being then admitted as a state, the judgment was certified by and the record deposited with the supreme court of the state; a writ of error to that court from the United States supreme court brought the case before the latter court, where it was held that as the proceedings were begun and consummated in the territorial courts, over which the United States supreme court properly exercises a revisory jurisdiction, the supreme court could take jurisdiction of the case; and as the record had been sent up to it by the supreme court of the state, it would proceed to revise the judgment, although the judgment so revised was certified by the state court and not by the territorial court. *Webster v. Reid*, 11 How., 453.

§ 1991. **When a territory is made a state, the cases pending in the territorial courts are divided between the federal courts in the new state and the state courts.** If the record of a

case shows it to be one within the jurisdiction of a federal court, it may be removed there; otherwise the state court may proceed with it. *Ames v. Colorado Cent. R. Co.*, 4 Dill., 256.

§ 1992. **Establishment of federal courts on the admission of Colorado.**—Under the act of 1876 establishing the federal courts in Colorado, and making them the successors of the supreme and district courts of the territory, as to cases of a federal nature, such cases then pending may be heard and decided by the federal court just as the court below would have proceeded, and it makes no difference in what way the cause, under territorial statutes, was brought into that court. *Bates v. Payson*,* 4 Dill., 265.

§ 1993. **Admission of Florida.**—By the admission of Florida into the Union in 1845, the territorial government was displaced and all powers and jurisdiction were abrogated. Hence the territorial district court established by congress had no jurisdiction of a suit begun in 1846, and a decree rendered in the suit was reversed. *Benner v. Porter*,* 9 How., 235.

§ 1994. By the admission of Florida, all its territorial courts lost their jurisdiction, and a conviction is erroneous made under an indictment found in the superior court of the territory, after the territory ceased to be, and transferred into the federal district court. *Forsyth v. United States*,* 9 How., 571.

§ 1995. **District courts of a territory have all the powers of the federal district and circuit courts so far as they may be applicable.** *United States v. Beebe*,* 2 Dak. T'y, 302.

§ 1996. The district courts of a territory are properly called United States district courts. *Choteau v. Rice*,* 1 Minn., 193.

§ 1997. **Appointment of attorney for territory.**—A territorial court has no power to appoint an attorney for the territory, but it may designate some one to fill this place in absence of an appointment by the United States, and such person will be entitled to proper fees. *In re Territorial Attorney*,* 6 Op. Att'y Gen'l, 80.

§ 1998. **An action to foreclose a mortgage will not be regarded as an action at law in the federal courts, although the territorial courts in which the suit was first brought no longer recognize the distinction between law and equity, and permit an appeal in all actions only by writ of error.** *Brewster v. Wakefield*, 22 How., 118.

§ 1999. **Mode of selecting grand jury.**—The district court of a territory is a federal court, and is governed, as to the mode of selecting the grand jury, by the acts of congress relating thereto. In the Matter of the Grand Jury,* 12 Int. Rev. Rec., 162.

§ 2000. **Boundaries — Trespass.**—Courts of a territory have no jurisdiction over the boundaries of claims of settlers of land, under an act which prescribes the mode of fixing the boundaries, but they have jurisdiction of a suit of trespass brought by a settler against one who infringes on his land. *Woodsides v. Rickey*,* 1 Or., 108.

§ 2001. **The supreme court of Arkansas Territory is exclusively an appellate court, and has no jurisdiction to grant a mandamus to a lower judge, commanding him to amend a record, since this is an exercise of original jurisdiction.** *Howell v. Crutchfield*, Hemp., 100.

§ 2002. **When, in Arkansas, the judges of the superior court, on an appeal from a circuit court of that territory, are equally divided in opinion, the judgment must be affirmed.** *Nicks v. Mathers*, Hemp., 81.

§ 2003. **Under a statute of the territorial legislature of Arkansas, that the superior court of that territory should be exclusively an appellate court, that court had not original jurisdiction.** *Clark v. Shelton*,* Hemp., 190.

§ 2004. **Salvage court in Florida.**—A court consisting of a notary and five jurors, established by the territorial legislature of Florida under the organic acts establishing the territorial government, for the purpose of trying cases of salvage, is in conformity with the constitution and laws of the United States, and its acts within the scope of its authority are valid. *American Ins. Co. v. Canter*,* 1 Pet., 511.

§ 2005. **Dakota — Foreign corporations.**—By statute, in Dakota Territory, foreign corporations may sue in the territorial courts upon furnishing security for costs. *American Button Hole, etc., Co. v. Moore*,* 2 Dak. T'y, 290.

§ 2006. **Montana — Legal and equitable remedies.**—It is competent for the courts of Montana to mingle legal and equitable remedies in the same proceeding. (*Affirming Hornbuckle v. Toombs*, 18 Wall., 648.) *Hershfield v. Griffith*,* 18 Wall., 657. See §§ 1976-78.

§ 2007. **The supreme court of Montana Territory has jurisdiction to issue a writ of mandamus to compel the governor to perform a ministerial act.** *Chumasero v. Potts*,* 2 Mont. T'y, 248.

§ 2008. **Utah — Divorce.**—The district courts of Utah Territory have jurisdiction of divorce cases. The statute conferring such jurisdiction on the probate courts is contrary to the organic act and void. *Cast v. Cast*,* 1 Utah T'y, 113. Therefore a decree of such court in a divorce case is void and cannot be appealed from to the district court. *Golding v. Jennings*,* 1 Utah T'y, 138. See §§ 1984-88.

§ 2009. — **impaneling jurors.**—The supreme and district courts of the territory of Utah are not federal courts in such a sense as to be bound by the acts of congress relative to the impaneling of jurors in the federal courts. *Clinton v. Englebrecht*, 13 Wall., 447.

§ 2010. The supreme court of the territory of Utah has no original jurisdiction conferred upon it by the organic act, save in a case of *habeas corpus*. The original jurisdiction is mainly in the district court. *Godbe v. Salt Lake City*,* 1 Utah T'y, 79; *Shepperd v. District Court*,* *id.*, 341.

2. State Courts.

[See III, 2, 3, 4, *supra*. Appellate Jurisdiction over State Courts, see APPEALS, VI. State Laws and Decisions, see CONSTITUTION AND LAWS, XIII, 7; PRACTICE. Removal from State Courts, see CONSTITUTION AND LAWS, XI, 2; CRIMES, XXXIII, 2; PRACTICE. See, also, STATES AND TERRITORIES.]

§ 2011. **Relation to federal courts.**—While the federal courts are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them, and may impeach them for want of jurisdiction. *Pennoyer v. Neff*, 5 Otto, 733.

§ 2012. While United States courts are not foreign courts in their relation to state courts, yet they have a distinct jurisdiction, and are only obliged to give such credit to the judgments of the state courts as other state courts would. They may always inquire into the question whether the state court had jurisdiction to render its judgment. *Galpin v. Page*, 3 Saw., 107.

§ 2013. **Appointing guardian ad litem of non-resident.**—A state court has no jurisdiction to appoint a guardian *ad litem* of a non-resident minor defendant, upon whom no actual service of notice of the suit has been made, and any decree made is void as against that defendant. *Ibid.*

§ 2014. A judgment rendered against a non-resident defendant in a state court, if purely personal, and given without actual notice to the defendant, and without his appearance, is made without jurisdiction and is void. If the suit, however, is *in rem*, against property of the defendant within the jurisdiction of the court, or if specific property is attached to answer the judgment in the case, or seized on execution to satisfy such judgment, the judgment is valid so far as the property involved is concerned. *Neff v. Pennoyer*, 3 Saw., 274.

§ 2015. **Jurisdiction as to foreign corporation.**—In 1852 a Connecticut corporation insured the life of E., a citizen of Virginia, in consideration of the annual payment of a specified premium to the end of his life. Premiums were paid only up to 1860, and in 1869 E. died. In 1856 the legislature of Virginia passed an act requiring all foreign insurance companies to appoint agents in the state, who should accept service of process. In the same year the company appointed L. as such agent. He acted as such till 1861, and did not act after that with its knowledge or consent. In 1866 the agency was formally revoked. After 1861 the company did no business in Virginia. L. died in 1876, and an administrator was duly appointed. In 1877 the legislature of Virginia passed another act, providing that if no successor was appointed upon the death of an agent, his personal representative should be regarded as the agent authorized to accept service of process against the corporation. The administratrix of E. sued the company on the policy in 1878, and served process on the administrator of the agent alone, and judgment was obtained by default. Suit was brought on this judgment in the circuit court of the United States. It was held that the act of 1877 was prospective only and did not apply to the defendant company; and that the Virginia court had no jurisdiction of the defendant. *Ellis v. Connecticut M. L. Ins. Co.*,* 19 Blatch., 383.

§ 2016. **Sending process into another state.**—A state magistrate cannot issue process into another state. *United States v. Little*, 2 Wash., 159.

§ 2017. **Judgment rendered after secession of state.**—A judgment rendered in a state court some days after the state had passed an ordinance of secession is not thereby invalidated, since the ordinance was itself a nullity and did not affect the jurisdiction of the state court or its relation to the United States courts. *White v. Cannon*, 6 Wall., 450.

§ 2018. **Mandamus to United States land register.**—A state court has no jurisdiction to issue a writ of *mandamus* to a land register, a United States official, to compel him to make certain disposition of United States lands and issue the regular documents of title. *M'Clung v. Silliman*, 6 Wheat., 599.

§ 2019. **Questions of jurisdiction.**—The court of last resort in every state decides upon its own jurisdiction and upon the jurisdiction of all inferior courts to which its appellate power extends. *Davis v. Packard*, 8 Pet., 323 (APPEALS, § 2718).

§ 2020. **Consuls.**— A consul-general of a foreign power is exempted from the jurisdiction of the state court, and should be sued only in some federal court. *Ibid.*

§ 2021. **Construing charter of railroad company.**— When a question is raised in a suit in a state court, whether a railroad company is authorized by its charter to do certain acts, and the court decides that it is so authorized, this decision, if not binding on the supreme court of the United States, is of high authority, and will not be disregarded. *Railroad Cos. v. Schutte*, 13 Otto, 143 (BONDS, §§ 1830-37).

§ 2022. **Seizures under revenue laws.**— A state court has no jurisdiction of a case concerning a seizure of goods or vessels for a forfeiture under the revenue laws of the United States. *Gelston v. Hoyt*, 3 Wheat., 312.

§ 2023. If cargo in a vessel is illegally seized by the surveyor of the customs, and replevied by the owner in a state court, in which case judgment is given against the revenue officer, on removal to the supreme court of the United States by writ of error, the jurisdiction of the state court to render its judgment will be sustained. *Slocum v. Mayberry*, 2 Wheat., 9.

§ 2024. **Trover for newspaper illegally held for postage.**— A state court has jurisdiction to try an action of trover to recover the value of a newspaper illegally held by a postmaster for more postage than was lawfully due. *Teal v. Felton*, 12 How., 292.

§ 2025. **County court of Virginia—Credit in other states.**— The regular proceedings and decree of a county court of Virginia are allowed the same credit in Kentucky as in Virginia. *Caldwell v. Carrington*, 9 Pet., 101.

§ 2026. **The superior court of Rhode Island** is the highest court of law of that state within the meaning of the twenty-fifth section of the judiciary act. *Olney v. Arnold*,* 3 Dall., 308.

§ 2027. **Chancery court in Maryland.**— The act of Maryland legislature of 1785, chapter 72, giving the chancellor power to sell the real estate of deceased persons in certain cases, is an extension of the jurisdiction of the court of chancery, not a personal power granted to the chancellor. *Bank of United States v. Ritchie*, 8 Pet., 143.

§ 2028. **District court in Louisiana.**— Article 126 of the Code of Practice of Louisiana, declaring that the jurisdiction of the district courts extends over all civil causes where the amount in dispute exceeds \$50, renders such courts courts of general jurisdiction. Where the purpose of the suit is to charge an executor or curator personally for fraud, maladministration, waste or embezzlement of the succession, the court of probate has no jurisdiction, but the case is within the jurisdiction of the district court. And where such a cause brought in the probate court is removed by consent of all the parties to the district court, the latter obtains jurisdiction thereby. *Forniquet v. Perkins*,* 7 How., 160.

§ 2029. **Parish courts of Louisiana.**— The jurisdiction of the parish court of Louisiana extends to suits by wives for separation of property. *Carite v. Trotot*, 15 Otto, 764.

§ 2030. **City court of Yonkers.**— By statute the city court of Yonkers is given all the jurisdiction of justices of the peace, and the same powers as the marine court of New York; also civil jurisdiction of actions for the recovery of money up to the amount of \$1,000. This court has, therefore, a common law jurisdiction, and may grant applications for naturalization, under section 2165 of the United States Revised Statutes. *United States v. Power*, 14 Blatch., 223.

§ 2031. **The district court of California**, a state court, having jurisdiction over cases of divorce, has also, under the statutes of the state, jurisdiction to make orders for the custody of children whose parents are divorced by the court. *Bennett v. Bennett*, Deady, 303.

§ 2032. **County court in Kentucky.**— The term "county court," as used in the act of the legislature of Kentucky of February 24, 1868, amending the charter of the Elizabethtown & Paducah Railroad Company, and providing that if any county shall subscribe to the capital stock of said company, under the provisions of this act, and issue bonds for the payment of such subscription, "it shall be the duty of the county court of such county . . . to cause to be levied and collected a tax" sufficient to pay the interest on the bonds, means a court composed of the county judge and the justices of the peace of the county; and the county judge alone cannot levy the tax provided for. *Meriwether v. Judge of Muhlenburg County Court*,* 8 Fed. R., 737.

3. Probate Courts.

[See ESTATES OF DECEDENTS.]

§ 2033. **Appointing administrator of living person—Letters as evidence.**— A probate court has no jurisdiction to appoint an administrator of a living person, and the letters of administration are not conclusive evidence of the death in a collateral proceeding. *United States v. Payne*, 4 Dill., 389.

§ 2034. **Appointing an administrator after the appointment of an executor.**— A probate court has no jurisdiction to appoint an administrator after an executor has been appointed.

Such an appointment is an act outside the jurisdiction of the court and is void. *Griffith v. Frazier*, 8 Cr., 22.

§ 2035. **Notice.**— A probate court is a court of limited jurisdiction. If its jurisdiction to appoint a guardian is dependent on a certain notice, and that notice is not given, the proceedings are null and void, and will not be considered in a circuit court of the United States. *Hart v. Gray*, 3 Sumn., 341; *Seaverns v. Gerke*, 3 Saw., 364.

§ 2036. A court of probate has only a special and limited jurisdiction. If required by statute to give notice before making a decree, such decree is void if made without notice, at least so far as concerns parties who were entitled to the notice. *Mathewson v. Sprague*, 1 Curt., 461.

§ 2037. — **waiver.**— A probate court is a court of limited and special jurisdiction. As it is required by statute to give notice to persons interested before it acts, any act done without such notice is without its jurisdiction and void. Although, generally, parties interested may waive notice, yet by the statutes of Rhode Island a guardian is not empowered to do so for his ward, and any proceeding on such waiver is a proceeding without notice. *Ibid.*

§ 2038. **Where the jurisdictional facts appear.**— If the only fact necessary to give the probate court power to order a sale of lands by an administrator is that it be made to appear that the personal property is insufficient to pay debts, and this fact is on the record of the probate court granting the order, the supreme court of the United States will not inquire into the regularity of the order, since the jurisdictional facts appear. *Comstock v. Crawford*, 3 Wall., 404.

§ 2039. Where, by statute of a territory, the only two facts necessary to give the probate court jurisdiction of a case are the death of a non-resident intestate and the possession by him at the time of personal property within the territory, and these facts appear on the record of a case afterwards brought before the supreme court of the United States, that court will not revise the decree of the probate court. *Ibid.*

§ 2040. **Recital in decree.**— An order of a state court of probate, decreeing the sale of land, and reciting that notice had been duly given in accordance with a previous order, is conclusive, in a federal court, that such notice had been given. *Segee v. Thomas*, 3 Blatch., 21.

§ 2041. **In Oregon.**— The powers of probate courts in Oregon are much larger than the powers of the ecclesiastical courts of England. A review of the history of probate courts. *Adams v. Lewis*, 5 Saw., 231.

§ 2042. By the constitution of Oregon, the county court, when sitting as a court of probate, is a court of general jurisdiction, and it is presumed to have jurisdiction until the contrary is shown. *Gager v. Henry*, 5 Saw., 241.

§ 2043. **In Mississippi.**— Under the act of congress (1 Stat. at Large, 88, 89), depositions are allowed to be taken before a "judge of a county court." A probate court of Mississippi, where one is organized for each county, and is a court of record and has a seal, is such a county court. *Fowler v. Merrill*, 11 How., 393 (CONV., §§ 1877-80).

§ 2044. **In Colorado Territory.**— The probate court of the territory of Colorado had no federal jurisdiction, and therefore no jurisdiction of a suit by an assignee in bankruptcy to recover assets of the bankrupt to an amount of more than \$500. *Hallack v. Tritch*,* 17 N. B. R., 293.

§ 2045. **In Montana Territory.**— The probate courts of Montana Territory have no jurisdiction of suits against administrators for misappropriation of the estate. *Deer Lodge County v. Kohrs*,* 2 Mont. T'y, 67.

§ 2046. **In Utah Territory.**— The probate courts of the territory of Utah had a general civil and criminal jurisdiction, both at law and in equity, conferred upon them by act of the territorial legislature. The act of congress which provided for the courts of the territory enacted that there should be a supreme and several district courts, which should have general jurisdiction at law and in equity. *Held*, that the jurisdiction at common law given by the territorial act to the probate courts was void, as contrary to the act of congress. *Ferris v. Higley*, 20 Wall., 379 (§§ 1984-88).

§ 2047. **In Kansas Territory.**— The act of the territorial legislature of Kansas, conferring upon the probate courts jurisdiction in common law and equity, is void. (Affirming *Locknane v. Martin*,* McCahon, 60.) *Dewey v. Dyer*,* McCahon, 77; *Otis v. Jenkins*,* McCahon, 87.

4. *Circuit Court for the District of Columbia.*

§ 2048. **Jurisdiction and powers.**— The circuit court of the District of Columbia has larger jurisdiction and powers than the other circuit courts of the United States. It can try other than federal causes. It may call a special session for the trial of causes, and may at that session also try causes which arose since the calling of the session. *United States v. Williams*, 4 Cr. C. C., 375.

§ 2049. The circuit court of the District of Columbia has a more extensive jurisdiction than other circuit courts. It has cognizance of all suits in law and equity which are not exclusively within the jurisdiction of the supreme court of the United States or the district court. *United States v. Kendall*, 5 Cr. C. C., 188.

§ 2050. **Source of jurisdiction.**—The jurisdiction of the circuit court in the District of Columbia is derived from act of congress and not from the laws of Maryland. *United States v. Tarlton*, 4 Cr. C. C., 682.

§ 2051. **Jurisdictional amount.**—If two separate causes of action are combined in one declaration, the federal circuit court in the District of Columbia has jurisdiction if the combined amount demanded is more than \$20, though each separate demand is less. *Ridgway v. Pancost*, 1 Cr. C. C., 88.

§ 2052. If a verdict is for the debt mentioned in the declaration, to be discharged on payment of a sum less than \$20, and the debt so mentioned is a note for \$214, this will support the jurisdiction of the federal circuit court in the District of Columbia, although the debt had been reduced, by payments on the note before suit, to a less sum than \$20. *Hays v. Bell*, 1 Cr. C. C., 440.

§ 2053. The amount demanded by a process of attachment being under \$20, the United States circuit court sitting in Alexandria has no jurisdiction of the case. *Rutter v. Merchant*, 1 Cr. C. C., 36.

§ 2054. A verdict for less than \$20 will not support the jurisdiction of the United States circuit court in the District of Columbia. *Curry v. Fletcher*, 1 Cr. C. C., 113; *McLaughlin v. Steele*, id., 483.

§ 2055. **Bastardy complaint.**—The circuit court of the United States sitting in the District of Columbia has jurisdiction of a bastardy complaint. *Ross v. Kingston*, 1 Cr. C. C., 140. But only upon complaint of one of the overseers of the poor. *United States v. Dick*, 2 Cr. C. C., 409.

§ 2056. **Quashing of inquisition.**—The federal circuit court in the District of Columbia is a court of record, and may cause an inquisition illegally returned to be quashed. *Georgetown Turnpike Co. v. Custis*, 1 Cr. C. C., 585.

§ 2057. **Granting ferry rights.**—In regard to granting rights of ferry, the federal circuit court in the District of Columbia has only the powers of a county court of Virginia. *Berry's Petition*, 2 Cr. C. C., 13.

§ 2058. **Application by apprentice for discharge.**—The federal circuit court in the District of Columbia has jurisdiction of an application by an apprentice to be discharged from service on account of the cruelty of the master. *Cannon v. Davis*, 1 Cr. C. C., 457.

§ 2059. **Suit against administrator appointed by state court.**—An administrator appointed by a state court cannot be sued in the circuit court of the District of Columbia for money received by him as administrator, even though the money was received as a debt due from the government at the treasury department at Washington. *Vaughan v. Northrup*, 15 Pet., 5.

§ 2060. **Injunction.**—The federal circuit court in the District of Columbia will grant an injunction against selling a free negro and allowing him to be carried out of the jurisdiction of the court, upon petition and affidavit. *McGunnigle v. Washington*, 2 Cr. C. C., 460.

§ 2061. **Mandamus.**—A writ of *mandamus* may be issued by the federal circuit court in the District of Columbia to compel a corporation in the District to pay an ascertained sum. *United States v. Corporation of Washington*, 2 Cr. C. C., 174.

§ 2062. It is within the jurisdiction of the circuit court for the District of Columbia to issue a *mandamus* to the postmaster-general of the United States to compel him to perform a ministerial act, the right of the person asking the writ and the obligation at law of the postmaster-general to perform the act being clear and undoubted. *United States v. Kendall*, 5 Cr. C. C., 266.

§ 2063. **Appeals from justices of the peace.**—The federal circuit court in the District of Columbia has no jurisdiction of appeals from a judgment of a justice of the peace for a violation of a by-law of a city. *Boothe v. Georgetown*, 2 Cr. C. C., 356.

§ 2064. No case in the District of Columbia, before a justice of the peace, can be appealed to the circuit court when the judgment is for less than \$5. *Owner v. Corporation of Washington*, 5 Cr. C. C., 381.

§ 2065. **Where there has been a jury trial before a justice.**—There cannot be a trial in the federal circuit court in the District of Columbia of a case which has been tried before a justice of the peace with a jury. The seventh amendment to the constitution forbids this (*Davidson v. Burr*, 2 Cr. C. C., 515; *Maddox v. Stewart*, id., 523; *Smith v. Chase*, 3 Cr. C. C., 349), unless the case was not within the jurisdiction of the justice at all. *Cross v. Blanford*, 2 Cr. C. C., 677.

§ 2066. Attachment issued by warrant of justice.—The circuit court of the District of Columbia has jurisdiction of an attachment issued by warrant of a justice of the peace under Maryland act of 1795, chapter 56. *Hard v. Stone*, 5 Cr. C. C., 503.

§ 2067. Subpoena traveling out of District.—A witness arrested in Virginia on attachment for contempt in not attending at the circuit court of the District of Columbia will be discharged on *habeas corpus* by the district court of Virginia, on the ground that the subpoena of the former court cannot rightfully travel outside the District of Columbia. *Ex parte Pleasants*, 4 Cr. C. C., 315.

§ 2068. Attachment for witness in Maryland.—The circuit court of the United States sitting in the District of Columbia will grant an attachment for contempt against a witness residing in Baltimore, who has been summoned and refuses to appear (*Hodgson v. Butts*, 1 Cr. C. C., 447), or anywhere in Maryland, if within one hundred miles of the place of holding court (*Sommerville v. French*, 1 Cr. C. C., 474), but not beyond that distance. *Henry v. Ricketts*, id., 580.

5. Miscellaneous Courts, including Courts-martial.

§ 2069. The supreme court of the District of Columbia is a court of the United States. *Noerr v. Brewer*,* 1 MacArth., 508.

§ 2070. The supreme court of the District of Columbia in general term has no jurisdiction to review the decisions of a justice of the peace. Such decisions are to be revised by a special term of the court, and its decisions are final. *Luchs v. Jones*,* 1 MacArth., 349.

§ 2071. County courts of District of Columbia.—Upon a claim for a debt of less than \$20 in the District of Columbia, an attachment must be sued out from the county courts under the provisions of act of Maryland, 1791, chapter 68, section 1, not act of 1795, chapter 56. *Dix v. Nicholls*, 2 Cr. C. C., 581.

§ 2072. Orphans' court in District of Columbia.—In the District of Columbia the orphans' court alone has the right to bind out apprentices while it is in session. *May v. Bayne*, 3 Cr. C. C., 335. It may bind out orphans without indentures. *Bell v. English*, 4 Cr. C. C., 332.

§ 2073. Orphans' court in Alexandria.—If a testator requests that his executors be not required to give security, the orphans' court in Alexandria may refuse to obey this request, if it appears that the property is not large enough to pay debts. *Ex parte Lee*, 1 Cr. C. C., 394.

§ 2074. The judge of the orphans' court in Alexandria has no power, under the law of Virginia (act of December 13, 1792, section 61, page 167), to compel any person to administer upon an estate contrary to his will, and if he had such power he could not compel the marshal of the District of Columbia to act. *Ex parte Ringgold*,* 3 Cr. C. C., 86.

§ 2075. Provisional court of Louisiana.—When the provisional court of the state of Louisiana was ended, its decrees were by statute made decrees of the circuit court of Louisiana, and an appeal is properly taken from that court to the supreme court of the United States. *The Grapeshot*, 7 Wall., 563.

§ 2076. The provisional court of Louisiana, established by the president on the 20th of October, 1862, did not cease to exist until July 28, 1866, when congress provided for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States. *Burke v. Miltenberger*, 19 Wall., 519.

§ 2077. In a criminal prosecution in the provisional court of Louisiana, on a plea to its jurisdiction, it was held that it was the right and duty of the president, as commander-in-chief of the army, to establish judicial tribunals in Louisiana after the conquest of that state by the federal troops; and that the powers of the courts established by the president's order of October 20, 1862, did not terminate with the military occupation of Louisiana, nor with the restoration in part of the civil government, but would continue so long as the president, or the government he represents, should will it, and uphold them. *United States v. Reiter*,* 4 Am. L. Reg. (N. S.), 534.

§ 2078. Military courts.—The constitution of the United States does not prevent the creation by military authority of civil courts in captured districts during war. The provost court, instituted by General Butler, in New Orleans, was a valid court. Such courts are military courts, and not courts of the United States. *Mechanics', etc., Bank v. Union Bank*, 22 Wall., 294.

§ 2079. Military commission.—Under the decision in *Ex parte Milligan*, 4 Wall., 2, a military commission convened in Washington, in 1865, does not have jurisdiction of offenses committed in the state of New York, by a citizen of said state, resident therein, and not connected with the military or naval service. (The offenses charged were the forgery and

sale of fraudulent papers and certificates of enlistment into the United States navy.) So held on a suit to recover property received by the government from the claimant while imprisoned under sentence of the commission, and appropriated by the government to a fine imposed as part of his sentence; which suit the court decided was under the circumstances maintainable. *Devlin v. United States*,* 12 Ct. Cl., 266.

§ 2080. **Confederate courts.**—The courts established by the Confederate government, and the decrees rendered by those courts, are nullities. *Hickman v. Jones*, 9 Wall., 197.

§ 2081. **Courts-martial.**—Congress has conferred jurisdiction upon the military and naval authorities to try by courts-martial military and naval offenses, both in times of peace and war. If one connected with the military or naval forces commits an offense, and severs his connection before trial, he is still liable to trial by court-martial. A paymaster's clerk, in the navy, on duty at a naval station, is a person in the navy so as to be liable to court-martial. *In re Bogart*, 2 Saw., 401. See WAR.

§ 2082. Courts-martial derive their jurisdiction either from acts of congress stating the crimes, the mode of trial and the punishment, or their jurisdiction may be derived by an inference that the act authorizing the punishment of a crime authorizes the punishment of a lesser crime of a kindred character, or by the thirty-second article of the rules for the government of the navy. *Dynes v. Hoover*, 20 How., 82.

§ 2083. The decree of a court-martial condemning a prisoner to imprisonment for attempt to desert, although the only specification in the charge was desertion, is not wholly void, but will protect the officer who executes it from an action for false imprisonment. *Ibid.*

§ 2084. A justice of the peace of the District of Columbia is a judicial officer of the government of the United States and exempt from militia duty. A court-martial, therefore, can have no jurisdiction over him as a militia-man, and any decision of that court affecting him is void, and will not protect an officer who attempts to enforce it. *Wise v. Withers*, 3 Cr., 336.

§ 2085. The laws of congress establishing the federal courts-martial have not excluded the jurisdiction of state courts-martial in cases where the federal laws have made no provision for the action of the federal courts-martial and the state laws are not plainly incompatible with such an exercise of power. *Houston v. Moore*, 5 Wheat., 25 (CONST., §§ 161-90).

§ 2086. A court-martial, deriving its authority from state laws, has jurisdiction to try and punish militia-men drafted by the United States, who have refused to obey the draft. The militia-men are not in the service of the United States until they have assembled at the rendezvous, and until that time the state authorities have concurrent jurisdiction with the federal authorities over them. *Ibid.*

IX. JUSTICES OF THE PEACE.

§ 2087. **Judgment must show jurisdiction.**—A judgment of a justice of the peace must affirmatively show his jurisdiction. *In re Wiseman*,* 1 Utah T'y, 42.

§ 2088. The jurisdiction of a justice of the peace to render a judgment must be apparent on the face of the record, as his court is a court of limited jurisdiction. *Walker v. Turner*, 9 Wheat., 546.

§ 2089. **Judgment in part for matter not within his jurisdiction.**—A judgment rendered by a justice of the peace in part for a matter not within his jurisdiction is wholly void. *Foy v. Talburt*,* 5 Cr. C. C., 124.

§ 2090. **Statute giving jurisdiction must be complied with.**—Where a state statute authorizes the seizure and sale of a vessel in an action for damages before a justice of the peace, the provision that the complaint shall set forth the plaintiff's demand in all its particulars, to be verified, etc., must be strictly complied with, or the justice will not acquire jurisdiction, and a purchaser will acquire no title. *The G. H. Montague*,* 4 Blatch., 462.

§ 2091. — **appearance and defense.**—And an appearance and defense by the agent of the owner will not aid the jurisdiction. *Ibid.*

§ 2092. **Titles or boundaries to land.**—Whenever titles or boundaries to lands come into dispute in a case before a justice of the peace, his jurisdiction ceases and he should dismiss the case. *Burt v. Reyburn*,* McCahon, 97.

§ 2093. **Release of part of debt to give jurisdiction.**—If a creditor release part of his debt, so as to give a justice of the peace jurisdiction of the case, and the debtor appears before the justice without objection, he cannot object on this ground on appeal. *Porter v. Rapine*, 2 Cr. C. C., 47. But he may, if he objects before the magistrate and his objection is overruled. *Cazenove v. Darrel*, id., 444.

§ 2094. A creditor may bring his claim within the jurisdiction of a justice of the peace, by releasing part of the claim; if the debtor does not object to the jurisdiction when the

case is heard before the justice, he cannot afterwards on appeal. *Maddox v. Stewart*, 2 Cr. C. C., 523. *Aliter* if the debtor objects before the justice. *Burton v. Varnum*, 2 Cr. C. C., 524.

§ 2095. **Suit for jurisdictional amount on note exceeding that amount.**—If one sue upon a note given for an amount exceeding the jurisdiction of the justice, but only sues for an amount within the jurisdiction of the justice, the jurisdiction of the court is good. The amount of the debt demanded by the plaintiff is what settles the question of jurisdiction. *Witt v. Hereth*, 6 Biss., 475.

§ 2096. **Separate notes for single debt.**—A., being indebted to B. in the sum of \$250, gave B. five separate promissory notes of \$50 each. *Held*, that suit might be brought on each note before a justice of the peace, whose jurisdiction covered cases where the debt did not exceed \$50. *Moore v. Hough*, 2 Cr. C. C., 561.

§ 2097. **Liability of justice for acting without jurisdiction.**—A justice of the peace who tries a case without having jurisdiction either of the subject-matter or the persons of the parties may be sued in trespass. *Holtzman v. Robinson*,* 2 MacArth., 522.

§ 2098. A justice of the peace who, without jurisdiction, issues writs of *feri facias* is liable to the party injured in trespass. *Plant v. Holtzman*, 4 Cr. C. C., 441.

§ 2099. **Liability for commitment upon illegal warrant.**—A justice of the peace is not liable for a commitment on an illegal warrant unless it was issued maliciously. *Neale v. Minifie*, 2 Cr. C. C., 16.

§ 2100. **When acts are not official.**—The acts of a justice of the peace are not official when things indispensable to bring his official power into action have been omitted. Hence when he issues a warrant on a criminal accusation, without probable cause, supported by oath or affirmation, he is not entitled to the protection provided by statute for his official actions. *Johnson v. Tompkins*, Bald., 571, 572.

§ 2101. **The admission of improper evidence** by a justice of the peace does not affect his jurisdiction. *Moore v. Waters*,* 5 Cr. C. C., 283.

§ 2102. **Refusal to allow jury trial.**—The refusal of a justice of the peace to allow a trial by jury in a case in which the demand was sufficiently large to entitle either party to such trial is a sufficient irregularity for setting aside the proceedings before him. *Miles v. James*,* Hemp., 98.

§ 2103. **Transcript sufficient to authorize the awarding of execution by another justice.**—A transcript from the record of a justice of the peace containing a statement that a judgment was rendered, but without giving a copy of the judgment, is not a sufficient record in the hands of another justice to authorize him to award an execution thereon. *Camp v. Price*,* Hemp., 174.

§ 2104. **Trial de novo on appeal.**—When a cause is appealed from the judgment of a justice of the peace, it must be tried *de novo*. *Minifie v. Duckworth*, 2 Cr. C. C., 39.

§ 2105. **In Kansas.**—Justices of the peace in Kansas have no jurisdiction of cases involving the title or boundaries of land. *Burt v. Reybrum*,* 2 West. L. Mo., 612.

§ 2106. **In Idaho Territory.**—When it appears from the sworn answer of a defendant in a civil suit before a justice of the peace in Idaho that the trial of the case will involve the question of title to real property, the case must be certified to the district court. *Langford v. Monteith*,* 12 Otto, 145.

§ 2107. **In Arkansas.**—A justice of the peace in Arkansas is required to keep a docket, and note in it every step in the progress of a cause, and it is incompetent for him, after having certified a transcript thereof to the circuit court, to supply any omission by certificate or otherwise. *Jacobs v. Jacobs*,* Hemp., 101.

§ 2108. **In Arkansas Territory.**—In suits before a justice of the peace of Arkansas Territory no formal pleadings are necessary. *Davis v. Pitman*, Hemp., 44.

§ 2109. Justices of the peace in Arkansas, under the territorial act of 1829, are limited in their jurisdiction in civil cases to the township in which they reside. *Leadbetter v. Kendall*,* Hemp., 302.

§ 2110. **In District of Columbia.**—*Quære*: Whether the authority to commit deserting sailors is not limited in the District of Columbia to justices of the peace. *Ex parte Sprout*, 1 Cr. C. C., 424.

§ 2111. A justice of the peace in the District of Columbia cannot issue a *capias ad respondendum*. *Ex parte Minor*, 2 Cr. C. C., 404.

§ 2112. Detinue is an action *ex contractu*, and as such is within the jurisdiction of a single justice of the peace in the District of Columbia. *Maynadier v. Duff*, 4 Cr. C. C., 4.

§ 2113. A justice of the peace in the District of Columbia has no jurisdiction of cases against an administrator. *Ritchie v. Stone*, 2 Cr. C. C., 258; *Adams v. Kincaid*, id., 422.

§ 2114. Under the act of March 1, 1823, a justice of the peace has jurisdiction of a proper case against an executor. *Ennis v. Holmead*,* 5 Cr. C. C., 509.

§ 2115. Justices of the peace in the District of Columbia have no power to bind apprentices while the orphans' court is in session. *Smith v. Elwood*, 4 Cr. C. C., 670.

§ 2116. In the District of Columbia a justice of the peace cannot take a recognizance in a bastardy process, unless upon application of an overseer of the poor. *United States v. Hancock*, 3 Cr. C. C., 81.

§ 2117. In the District of Columbia justices of the peace have jurisdiction of suits against women in cases not exceeding \$50 in value. *Johnson v. Corporation of Washington*, 5 Cr. C. C., 434.

§ 2118. A justice of the peace in the District of Columbia has no authority to commit one to labor for failure to pay a fine. Any city by-law purporting to give such authority is void. *Ex parte Williams*, 4 Cr. C. C., 347.

§ 2119. In the District of Columbia a creditor may relinquish interest on an open account, and if the principal is less than \$50 he may sue before a justice of the peace, and if he claims a jury trial the proceedings will not be reviewed on a writ of *certiorari* by the circuit court. *Homans v. Moore*, 5 Cr. C. C., 505.

§ 2120. If interest is due on a debt, and interest and principal amount to more than \$50, a justice of the peace in the District of Columbia has not jurisdiction of the case. *Milburn v. Burton*, 2 Cr. C. C., 639.

§ 2121. If a city corporation wishes to recover for breach of its by-laws, in the District of Columbia, it may do so in the justice's court, if the penalty does not exceed \$50, but the justice cannot punish corporally the person who is guilty of such breach. *Ex parte Reed*, 4 Cr. C. C., 582.

§ 2122. No appeal is given from the judgment of a justice of the peace in the District of Columbia, unless the debt or demand exceeds the sum of \$5. *Thornton v. Corporation of Washington*, 3 Cr. C. C., 212.

§ 2123. A justice of the peace in Washington county, District of Columbia, is not a judicial or executive officer of the federal government, so as to be exempt from militia duty. *Wise v. Withers*, 1 Cr. C. C., 262.

X. CONTEMPT OF COURT.

[See ATTORNEYS, I.]

SUMMARY—*Application of act of 1831 to supreme court*, § 2124.—*When federal courts may punish*, § 2125.—*Punishments to be imposed*, § 2126.—*No power to disbar an attorney*, § 2127.—*Crime at common law*, § 2128.—*Crime under judiciary act*, § 2129.—*Practice when respondent is out of district*, § 2130.—*Imposing penalty for, is final judgment*, § 2131.—*United States a party*, § 2132.—*Power of enforcing penalty*, § 2133.—*Practice in instituting proceedings for*, §§ 2134, 2135.—*Crime against the United States*, § 2136.—*Court to proceed only in clear cases*, § 2137.—*De bene esse examination of witness*, § 2138.—*Answer must be taken as true*, § 2139.—*Answer must be credible and consistent*, § 2140.—*Violation of an order quieting a title*, § 2141.—*Interference with property in possession of a receiver*, §§ 2142, 2143.—*Pardoning power only in the president*, §§ 2144, 2145.—*Service of process in presence of court*, § 2146.

§ 2124. *Quære*: Whether the act of March 2, 1831, as to power of courts to punish for contempt, applies to the supreme court. *Ex parte Robinson*, §§ 2147-49.

§ 2125. Under this act the powers of the federal courts to punish for contempt are to be exercised only to secure order in their presence, to insure faithfulness on the part of their officers, and to enforce obedience to their orders. *Ibid.*

§ 2126. Under the judiciary act the punishments to be imposed by the federal courts for contempt are limited to fine and imprisonment. *Ibid.*

§ 2127. The federal courts have no power to summarily disbar an attorney for contempt. *Ibid.*

§ 2128. Contempt of court is a crime at common law. *United States v. Jacobi*, §§ 2150-2153.

§ 2129. Under the judiciary act contempt is a crime against the United States, and the offender may be proceeded against by indictment. *Ibid.*

§ 2130. A person charged with contempt must be arrested and imprisoned before a warrant will issue for his removal into another district, and an application for a warrant for arrest and removal as the first step will be denied. *Ibid.*

§ 2131. An order of court imposing a penalty for contempt is a final judgment over which the court has no power after the end of the term. *Fischer v. Hayes*, §§ 2154-57.

§ 2132. In an order against a defendant for violating an injunction in the suit, it is not necessary to make the United States a party in the title. *Ibid.*

§ 2133. A court, having fined a party for contempt, may order him committed until the fine is paid. This is not punishment by fine and imprisonment. *Ibid.*

§ 2134. It is competent for the federal courts, under the ninetieth supreme court rule, regulating the equity practice by analogies drawn from the English practice, to issue a rule to show cause against an attachment for contempt, instead of conforming exactly to the English practice and issuing an order of committal with notice served upon respondent. *Fan-shawe v. Tracy*, §§ 2158-64.

§ 2135. It is within the discretion of the court to issue an attachment in the first instance, or a rule to show cause, though the former should not be the regular practice. *Ibid.*

§ 2136. Contempt, though in one sense not a crime, is an offense against the United States, which is the real party in a proceeding thereon. *Ibid.*

§ 2137. Attachments for contempt will only be granted in clear cases and upon full proof. *In re Judson*, §§ 2165-67.

§ 2138. Before the court will adjudge a witness in contempt for refusing to answer a question upon a *de bene esse* examination before a commissioner, it must appear that the question is relevant and material, and that the witness is not legally exempt from answering it. *Ibid.*

§ 2139. It is a cardinal rule in proceedings for contempt, that the answer of the respondent cannot be traversed, and must be taken as true. *In re May*, §§ 2168-70.

§ 2140. The answer of respondent must be credible and consistent, and the court may draw its own inferences, when facts are stated inconsistent with the intention avowed. *Ibid.*

§ 2141. Where a decree established the title of complainant to certain bonds and enjoined defendant from ever setting up title to them, the latter committed a contempt of court in afterwards serving a written notice upon the holder of the bonds that he claimed to own them, and intended to institute proceedings for their recovery. *In re Chiles*, §§ 2171-72.

§ 2142. Property in possession of a receiver is in custody of the court, and all persons interfering with the receiver's possession are guilty of a contempt. *Secor v. Railroad Co.*, §§ 2173-75.

§ 2143. When a road is in possession of a receiver, any interference with the employees or with the property itself, preventing the operation of the road, is punishable as a contempt. *Ibid.*

§ 2144. A contempt of a federal court is an offense against the United States, and the sole pardoning power therefor is in the president. The court will not exercise this power, at least until the executive department disclaims its own right so to do. *In re Mullee*, §§ 2176-2178.

§ 2145. If fines ordered to be paid to the United States or to private parties, in punishment of a contempt, become a debt in the nature of a judgment, the president has at least power to discharge from imprisonment for the non-payment of the fines. *Ibid.* See CRIMES, XXXIV.

§ 2146. The privilege of suitors attending court is of exemption from arrest, not from service of process, and it is no contempt of court to serve such a party with a summons, unless done in presence of the court, actual or constructive. *Blight v. Fisher*, § 2179.

[NOTES.— See §§ 2180-2266.]

EX PARTE ROBINSON.

(19 Wallace, 505-513. 1873.)

PETITION for a *mandamus*.

STATEMENT OF FACTS.—Petition by Robinson, an attorney, for a *mandamus* to compel the judge of the district court for the western district of Arkansas to vacate an order disbaring the petitioner for contempt. The grand jury had reported to the court that a certain witness, after seeing Robinson, had suddenly absented himself, and they prayed that the attorney be brought before them. Upon this the court issued an order that he show cause why he should not be punished as for a contempt. An order of court is now shown which states that Robinson, in a "grossly contemptuous, contumacious and defiant manner, in open court, refused to respond in writing," and goes on to decree that he be disbarred as an attorney and that his license be vacated.

§ 2147. *Power of federal courts to punish for contempt as limited by act of March 2, 1831.*

Opinion by MR. JUSTICE FIELD.

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the en-

forcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2, 1831 (4 Stats. at Large, 487). The act, in terms, applies to all courts; whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by act of congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes.

If we now test the report of the grand jury by this statute, we find nothing in it which justified any proceeding whatever as for a contempt on the part of the court below against Robinson. No act of his is mentioned which could constitute within the statute a contempt either of the court or of its judge. The allegation that the witness Stephenson, after seeing Robinson, had suddenly absented himself, amounted to nothing more than an insinuation that possibly he may have been advised to that course by Robinson. There was no averment of any fact which the court could notice or the attorney was bound to explain. Whatever contempt was committed by the petitioner consisted in the tone and manner in which his language to the court was uttered. On this hearing we are bound to take the statements in that respect of the judge embodied in his order as true, for the question before us is not whether the court erred, but whether it had any jurisdiction to disbar the petitioner for the alleged contempt.

§ 2148. *The punishment which a court may impose. An attorney may not be disbarred in a summary method as for contempt, but only after opportunity to be heard has been afforded.*

The law happily prescribes the punishment which the court can impose for contempts. The seventeenth section of the judiciary act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbaring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void.

The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such con-

duct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and, as said in *Ex parte Garland*, 4 Wall., 378 (CONST., §§ 619-637), "they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. *Ex parte Heyfron*, 7 How. (Miss.), 127; *People v. Turner*, 1 Cal., 148; *Fletcher v. Daingerfield*, 20 id., 430; *Beene v. State*, 22 Ark., 157; *Ex parte Bradley*, 7 Wall., 364 (ATTORNEYS, §§ 21-29); *Bradley v. Fisher*, 13 id., 354 (ATTORNEYS, §§ 56-64). The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.

§ 2149. *Mandamus is the proper remedy for an attorney illegally disbarred.*

That *mandamus* is the appropriate remedy in a case like this to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter, was decided in *Ex parte Bradley*, reported in the 7th of Wallace. It would serve no useful purpose to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory. A peremptory *mandamus* must issue, requiring the judge of the court below to vacate the order disbarring the petitioner, and to restore him to his office.

Mandamus awarded. (a)

MR. JUSTICE MILLER dissented.

UNITED STATES v. JACOBI.

(District Court, Western District of Tennessee: 1 Flippin, 108-115. 1871.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—There has been presented to me, while discharging the duties of district judge of west Tennessee, a certified copy of the record of proceedings had in the United States circuit court of the eastern district of Arkansas, and a writ of attachment therein against Theodore Jacobi in a case of wilful contempt for disobeying the subpoena of that court issued in a civil suit. I am asked to issue a warrant to arrest and remove Jacobi to the eastern district of Arkansas, he now being in this district. This application is based on section

(a) Robinson had taken an appeal before applying for a *mandamus* in the above case, and on motion to advance the case it was held that an appeal was not the proper remedy.

33 of the judiciary act of 1789 (1 Stat., 91; Brightly, 90, § 1), which provides that "for any crime or offense against the United States, the offender . . . may be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense.

"And if such commitment of the offender . . . shall be in a district other than that in which the offender is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender . . . to the district in which the trial is to be had."

Is a wilful contempt of a court of the United States "any crime or offense against the United States" within the meaning of section 33 of the judiciary act? If not, Jacobi cannot, within the language of that section, "be arrested and imprisoned or bailed . . . for trial before such court of the United States as by this act has cognizance of the offense," nor can the judge of this district issue a warrant for his removal to another district, even if Jacobi had been here imprisoned by a committing magistrate.

§ 2150. *Contempt of court a crime at common law.*

That a wilful contempt is an offense at common law, within no limited or restricted sense, but in the general sense of crime, cannot be successfully questioned. In the fourth volume of Blackstone, p. 279, entitled "Summary Convictions," contempt is treated as a crime. The author says: "We are next . . . to take into consideration the proceedings in the courts of criminal jurisdiction in order to the punishment of offenses." He treats of these proceedings as of two kinds, "summary and regular." Under summary proceedings is ranked attachments for contempt of court. At page 286, it is said "the process of attachment for these and like contempts must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempt by an immediate attachment of the offender, results from the first principles of judicial establishment and must be an inseparable attendant upon every superior tribunal." Again, at page 124, it is said: "Contempts against the king's palaces or courts of justice have always been looked upon as high misprisions." Misprisions, according to the English common law, are all such high offenses as are under the degree of capital, but nearly bordering thereon. 4 Blackstone, 119. See, also, on the subject of contempts being crimes and prosecuted as crimes, Crosby's Case, 3 Wils., 188; Williamson's Case, in 26 Penn. St., 18, 19; United States v. Duane, Wall. C. C., 102; Mullee's Case, 8 Int. Rev. Rec., 89.

§ 2151. *No common law offenses against the United States.*

But as there are no common law offenses against the United States—in other words, as no crimes against the United States exist by force of the common law—the legislative authority of congress must first make the doing or omission of an act a crime. It would seem from this that the power of the federal courts to deal with contempts, in the absence of any statutory authority of congress, would exist merely as a means to enforce obedience to lawful mandates of the courts in a jurisdiction; being exercised, not however as a crime against the United States, but as the courts of chancery in England, prior to the introduction of sequestrations in the several stages of a cause, enforced their decrees by process in the nature of contempt, acting only *in personam* and not *in rem*. 4 Blk., 287, 288. That the courts of the United States could

deal with contempt without any act of congress authorizing it, as an incident of their establishment, was distinctly held in *Ex parte Kearney*, 7 Wheat., 38, and *United States v. Hudson*, 7 Cranch, 32.

§ 2152. *Under the judiciary act, contempt is a crime against the United States, and the offender may be indicted.*

What is to be the construction of the seventeenth section of the judiciary act, in which act is section 33 already given, in view of the fact that, when the judiciary act was passed, contempt was recognized as a common law offense? Section 17 reads: "All the said courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat., 83; 1 Brightly, 189, § 1. It will be found on examining the criminal statutes passed by congress that it is seldom that a crime is declared to be such in terms. On the contrary, very many of the statutes under which persons are constantly tried for crimes against the United States simply impose fine or imprisonment, or both, in the discretion of the court, for the particular act. This is precisely what congress has done by the seventeenth section of the judiciary act, viz.: given the courts the power to punish by fine or imprisonment, at their discretion, all contempts of authority. It is a general and sound rule of criminal law that whenever the legislative power has declared an act or omission of an act to be punishable by fine or imprisonment, that act done or omitted wilfully is a crime, and may be punished by indictment.

"A crime," says Bouvier's Law Dictionary, 384, "is an act committed or omitted in violation of a public law, either forbidding or commanding it." The United States courts are authorized to issue subpoenas for witnesses, enjoin parties, etc. If the witness disobeys such lawful command, or if a party disobeys an injunction lawfully issued, in either case he has violated the law of congress which confers such authority on the court. Congress has said, for any such disobedience the party may be punished by the court whose authority has been set at naught in any cause or hearing before it, by fine or imprisonment, at its discretion.

The effect of the legislation by congress on the subject is that witnesses and parties shall obey the commands of the court lawfully made, and, if they disobey, they shall be punished by fine or imprisonment. Hence I hold that section 17 makes contempt of court a crime against the United States. Now, that it is, within section 33, a crime for which the party may be arrested and imprisoned, or bailed, I do not doubt. The fact that the mode of trial in contempt cases is summary, by attachment, etc., and therefore peculiar or different from trials for most other crimes, is not at all significant of whether contempt is a crime or offense within the meaning of section 33 of the judiciary act. This section was clearly designed to embrace, as its language does, "any crime or offense against the United States," and for which the offender may be "arrested and imprisoned, or bailed, . . . for trial before such court of the United States as by this act has cognizance of the offense."

Although the ordinary process of arrest in these cases is by attachment, and the mode of trial summary, I do not doubt that the offender may be prosecuted without attachment and without interrogatories in the summary way, viz.: by warrant of arrest on complaint, in the ordinary and regular mode of proceeding against offenders as prescribed by section 33. He may be arrested, and, when brought before the officer and an examination is had, may be committed or bailed, and may be thereafter prosecuted through the form of a criminal in-

formation or indictment, as in the case of other misdemeanors. In *Hollingsworth v. Duane*, Wall. C. C., 77, it is remarked, in reference to contempts to inferior jurisdictions, that for all contempts not committed in the presence of the court and punished instanter—in which cases only can such courts punish summarily for contempt—there is no other mode of punishment than by indictment. The supreme court of Pennsylvania, in *Passmore Williamson's Case*, *supra*, say: “It must be remembered that contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction.” I do not doubt, as I have said, that any wilful contempt which the United States courts may deal with at all may be regularly prosecuted by indictment, and that under either mode of proceeding section 33 is ample to authorize the arrest of Jacobi and his removal.

§ 2153. *A person charged with contempt of court must be arrested and imprisoned before a warrant can be issued for his removal to another district. Requisite authority for issuance of warrant.* (See CRIMES, XXXIII, 1.)

To some extent, I remark, the practice in some districts has been, in contempt cases where the offender had absconded from the district in which his disobedience occurred, to proceed under section 33, for a crime against the United States. I see no other way to reach an offender thus situated, and it requires no strained construction to say that section 33 is ample to cover all such cases. But while I hold wilful contempt of a federal court to be an offense against the United States, and that the offender may be proceeded against by arrest and be imprisoned, if not bailed, I am at the same time of opinion that no warrant for the removal of the accused can in any case be issued until the accused has been arrested and imprisoned. If the accused offers satisfactory bail, it is his right, under section 33, to be discharged on bail. The section says: “And upon all arrests in criminal cases bail shall be admitted, except when the punishment may be death.”

My opinion is, also, that the certified copy of the proceedings of contempt and of the attachment are sufficient to justify, not only the United States in making the necessary complaint, but to authorize the issuance of a warrant of arrest by the proper officer, precisely as a certified copy of an indictment would be in any other case of crime. If the accused does not avail himself of his right to give bail to appear and answer before the circuit court of Arkansas at a time to be fixed by the examining magistrate or commissioner, the papers afford sufficient evidence to authorize his imprisonment. When committed, the judge of the district would be authorized to issue a warrant to remove. My views on this subject are to some extent expressed in the case of *The United States v. Shepard*, 1 Abb., 434, 435 (CRIMES, §§ 3195–99). In that case I say, after referring to the clause of section 33 of the judiciary act, in reference to the removal of offenders: “By consulting the previous portion of this section in connection with the clause I have read, it will appear that the warrant of removal is authorized only where the offender has been first arrested and committed for want of bail. In a bailable case the statute does not seem to contemplate or warrant removing a person from one district to another in the summary way pursued in this case. He is first to be taken before the proper officer, who is to examine as to the crime alleged against the accused.”

“If there is not probable cause of his guilt, he is entitled to be discharged; whereas, if there be found reasonable cause for holding the accused to answer, upon tendering sufficient bail he is entitled to his discharge from arrest. Only

on failure to give bail in a bailable case can he be committed." See, also, Mr. Justice Miller's opinion in 1 Woolworth's Cir. Ct. R., 422. That learned judge says, at page 426: "The section which I have quoted (section 33) . . . does not, in express terms, say that a person charged with an offense against the laws of the United States must have an examination in the district where he is arrested, though the offense be committed in another state. It does not in so many words say that he shall undergo an examination at all. The language is that he may be arrested and imprisoned or bailed.

"But this is to be done according to the usual mode of proceedings against such offenders in the state where he is arrested." "It would be a waste of time to show that an imprisonment or order for bail is never made in any state without previous examination. Nor would any well-informed lawyer hesitate to hold that the act of congress in question was not intended to authorize imprisonment without such preliminary examination by the committing magistrate as should satisfy him that there was enough evidence of the prisoner's guilt to justify a reference of the case to a grand jury of the proper district."

What I have said of the sufficiency of the evidence afforded by a certified copy of the papers in this application, on the party being brought up for examination concerning the charge, is intended, of course, as saying that, in my opinion, they would afford *prima facie* evidence of the truth of the charge, and, in the absence of other evidence, justify holding the party to answer. As this application is for a warrant to arrest and remove as the first step, it must be denied. When the proceedings indicated as necessary to precede a warrant to remove have been had, and should the delinquent be imprisoned, an application to me while discharging the duties of the district judge of west Tennessee for such warrant will be successful.

FISCHER v. HAYES.

(Circuit Court for New York: 19 Blatchford, 13-25. 1881.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This suit is brought for the infringement of letters patent No. 74,068, granted to the plaintiff February 4, 1868, for an "improvement in machine for forming sheet metal mouldings." The patent was before this court in *Fischer v. Wilson*, 16 Blatchf. C. C. R., 220, and was sustained in April, 1879. This suit was brought in May, 1879. On a motion made on due notice to the defendant, this court, on the 14th of June, 1879, issued a preliminary injunction restraining the defendant from making, using or selling any machine embodying the inventions described and claimed in the second and fourth claims of the patent. This injunction was served on the defendant on the same day. Afterwards, a motion founded on affidavits, sworn to July 18, 1879, was made before the court for an attachment against the defendant for contempt for violating said injunction. The affidavits were those of Erickson, Conolly and Abbott, and went to show a violation of the injunction by the defendant after its service on him, in the use, in making sky-light bars, of improvements covered by the second and fourth claims of the patent. The sky-light bars were made of sheet metal, and were formed and bent on a machine. The affidavits set forth the particulars of the alleged contempt charged, and were filed in court, and copies of them were served on the defendant on the 28th of July, 1879. The defendant opposed the motion on affidavits, and the court made an order on the 1st of August, 1879, requiring the defendant to

furnish an inspection, on the part of the plaintiff, of his machinery for bending sheet metal and of the method of bending such sheet metal used by him. The order said: "it being the object and intention of this court to enable the complainant herein to present such evidence to the court herein as will enable the complainant to make out, if the fact be so, the infringement of the patent here in suit, and a contempt of the injunction heretofore issued and served herein," and referred it to Mr. Shields to ascertain the fact of said infringement "if the same be so," and report his finding to the court, and ordered "that the complainant may examine before the said referee George Hayes, and all his employees and assistants, and that both parties may examine such other witnesses as they may elect to examine."

The reference before Mr. Shields commenced on the 29th of August, 1879. Witnesses for both parties were examined before the referee. The defendant was examined on the part of the plaintiff and took no objection to the propriety or lawfulness of his being examined. He was also examined as a witness on his own behalf. The report of Mr. Shields was filed January 8, 1880. This court had, on the 30th of June, 1879, on motion and due notice, made an order adjudging the defendant guilty of contempt by using a machine for bending sheet metal in violation of said injunction. The proceedings covered by the motion which resulted in the order of August 1, 1879, related to a violation after June 30, 1879, and the testimony before Mr. Shields and his report related to such a violation. Mr. Shields, in his report, found that the defendant had, since the order of June 30, 1879, infringed the fourth claim of the patent, and stated in detail wherein such infringement consisted. The defendant filed exceptions to the findings in the report. On all the proceedings in the case, and the testimony taken before Mr. Shields, and his report, the plaintiff moved before this court, on due notice, "for an order for attachment for contempt and punishment herein, notice of motion for which has been heretofore served on you, and which motion has been partially heard, and was referred to John A. Shields, Esq., referee, on the 1st day of August, 1879." On the hearing thereon the court, on the 7th of February, 1880, made an order as follows, entitled in this cause: "A motion for attachment for contempt having come on to be heard herein, and the matter having been referred to John A. Shields, Esq., to take the testimony of and to hear the parties, and to report to the court on the question of infringement, and the said referee having reported that the defendant has used the invention described in the letters patent on which this suit is brought, in violation of the injunction of the court herein, since about the 2d day of July, 1879, and the said referee's report having been presented to this court for confirmation, and Mr. Blake having been heard for complainant and Mr. Whitelegge for defendant, now, therefore, it is hereby ordered, adjudged and decreed, that the said report be, and it hereby is, confirmed. . . . And it is further ordered that the further hearing of this motion, on the question of punishment and terms, go over until Friday, February 13, 1880, at the opening of court on that day."

On the 17th of February, 1880, this court made an order as follows, entitled in this cause: "A motion for attachment for contempt herein having come on for further hearing, on the question of punishment or terms, on this 13th day of February, 1880, and Charles F. Blake, Esq., having been heard for the motion, and J. H. Whitelegge, Esq., opposed, now, therefore, it is hereby ordered and decreed that the defendant is adjudged to have committed the contempt alleged, and that he pay, as a fine therefor, the amount of all costs, charges

and disbursements whatsoever suffered, borne or incurred by the complainant by reason of, or on account of, the said motion; and that the question of the amount of the said fine be submitted to this court on affidavits and without argument, as follows: the complainant to serve his affidavits on the solicitor for the defendant on or before Friday, February 20, 1880; that defendant serve his replying affidavits on counsel for complainant on or before Tuesday, February 24, 1880, and that complainant have the right to reply, and that all affidavits be filed on or before Friday, February 27, 1880." The plaintiff presented to the court two affidavits on his part, copies of which had been served on the defendant's solicitor on the 20th of February, 1880. The defendant replied to those affidavits by an affidavit of his own, a copy of which he served on the plaintiff's solicitor on the 27th of February, 1880. Thereupon this court, on the 13th of March, 1880, made an order, entitled in this cause, "on motion for second attachment for contempt," and reading as follows: "This motion having been heard on the 1st day of August, 1879, on affidavits and argument by counsel for the respective parties, and thereupon an order having been duly made that it be referred to John A. Shields to ascertain the fact of said infringement, if the same be so, and report his finding to this court; and, upon the coming in of the report of said referee, and hearing counsel for the respective parties, in support thereof and in opposition thereto, said report was confirmed, and it was then further ordered that the complainant file with the court, and serve copies on defendant, affidavits showing the expenses incurred in the prosecution of this second attachment for contempt; that defendant file and serve answering affidavits, and that complainant may reply thereto; and an amended order and the affidavit of George Hayes, the defendant, executed on the 26th day of February, 1880, having been filed in reply to said complainant's affidavits, it is, upon consideration thereof, ordered that the defendant pay into court the sum of \$522.49, as set forth in the affidavit of Baron Higham, executed herein on the 16th day of February, 1880, and the further sum of \$867.50, as set forth in the affidavit of Valentine Fischer, executed herein on the 20th day of February, 1880, amounting together to the sum of \$1,389.99, as a fine for said second contempt, within thirty days from the date of the entry of this order, to wit, the 12th day of April, 1880, and that if not paid the defendant stand committed till it be paid, and that when paid it be paid over to the plaintiff in reimbursement."

On the 11th of May, 1880, the defendant sued out a writ of error from the supreme court of the United States, to reverse the said judgment convicting him of a contempt. The plaintiff moved in that court to dismiss said writ of error, and the supreme court dismissed it for want of jurisdiction, on the 29th of November, 1880. The plaintiff now, on presenting to this court the mandate of the supreme court dismissing said writ, moves for an order that the said order of March 13, 1880, be carried into effect; and the defendant, at the same time, moves that the said order of February 17, 1880, and the said order of March 13, 1880, be declared inoperative and void and of no effect, or that the plaintiff be perpetually restrained and enjoined from any further action or proceeding respecting the same.

It is provided by section 725 of the Revised Statutes that the courts of the United States shall have power to punish, "by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct

the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts." It is contended for the defendant that to render effectual a judgment or order convicting a party of a contempt, founded on his disobedience to an order of the court, three things must concur: (1) The order must be founded upon some legal or equitable right vested in the party at whose instance it is issued; (2) the order must be lawful and duly authorized at the time it issues; (3) the disobedience to it must be wilful.

§ 2154. *An order imposing a penalty for contempt is a final judgment, over which the court has no power after the end of the term.*

It is well settled that contempt of court is a specific criminal offense, and that the imposition of a fine for a contempt is a judgment in a criminal case. *New Orleans v. Steamship Co.*, 20 Wall., 387, 392. Although there has as yet been neither an interlocutory nor a final decree on the merits in this suit, yet the order imposing the fine for the contempt was a final order or judgment as to the matter of the contempt. The last order as to that matter was made prior to the April term, 1880. Since it was made the April term, 1880, has begun and ended, and we are now in the October term, 1880. The defendant's motion has not been made till in the present term. The general power of the court over its own judgments, orders and decrees, in civil and criminal cases, during the existence of the term at which they are first made, is held to be undeniable. *Ex parte Lange*, 18 Wall., 163, 167 (CRIMES, §§ 1767-74). And it is further held that the power to vary a final judgment or order, at least in a case where there was jurisdiction to make it, does not exist after the term at which it was made. *Bank of United States v. Moss*, 6 How., 31 (§§ 53-59, *supra*); *The Bank v. Labitut*, 1 Woods, 11. In *United States v. Moss*, it was held to be too late, after final judgment, and at the next term, and by motion only, to set aside a judgment on account of a supposed want of jurisdiction; and the authorities cited in that case show it to be well settled, that no error of law or fact, if any, not involving jurisdiction, committed by this court in making the order now sought to be vacated, can be rectified by this court on this motion. It does not appear that any error was committed, but for the foregoing reason it is not necessary to discuss that question. The utmost that the defendant could claim would be to have the court consider the question of jurisdiction now, as if he were in custody for the non-payment of the fine, and were before this court on a writ of *habeas corpus*.

The foregoing views cover all the suggestions made, in argument, that the defendant, in the infringement on which the order in question was based, was guided by what he understood to be the views expressed by the court in its decision in *Fischer v. Wilson*, 16 Blatch., 220; that his infringement was, therefore, not wilful, though mistaken; that the infringement was committed by the making of the sky-light bars; that the patent of the plaintiff was and is invalid, and, therefore, the injunction that was disobeyed was not a lawful order; and that the amount arrived at as a fine was not proved in a proper way.

§ 2155. *Particularity required in an order adjudging a party guilty of a contempt.*

Some points are made on the part of the defendant, which are taken by him as arising on the face of the proceedings.

(1) It is objected that the order of February 17, 1880, decrees only "that the defendant is adjudged to have committed the contempt alleged," without reciting further the offense of which he is guilty. It is insisted that this was necessary, and further, that the order should have recited that the defendant had disobeyed a *lawful* order of the court and was guilty of a contempt of court in so doing. The contempt alleged is set forth with sufficient particularity in the affidavits on which the motion for attachment was founded and in the report of the referee. All the proceedings and the various orders are sufficiently connected together, by reference and recital, to identify "the contempt alleged," without the necessity of reciting at length, in the orders, the particulars of the previous proceedings. The original motion was noticed as a motion for an attachment for contempt for a violation of the injunction, and the proceedings went on to ascertain that fact. The order of August 1, 1879, on its face, referred to the matter of a contempt of the injunction, and that is the "contempt" referred to in the orders of February 7th and 17th, and "the contempt alleged," spoken of in the latter order. It was not necessary to recite that the injunction was a lawful injunction.

§ 2156. *Proper title of proceedings in cases of contempt.*

(2) It is urged that the fine for contempt could not be imposed by an order made in the suit, but that the order should have been made in a proceeding in the title of which the United States were made a party to the proceeding. It is said, in *The People v. Craft*, 7 Paige, 325, that, in proceedings in equity, between parties to the suit, for contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings on the attachment may be, and usually are, entitled as in the original suit, though it is not irregular to entitle them in the name of The People, on the relation of the person prosecuting the attachment, against the defendant or party proceeded against. Where the attachment proceeding for a contempt is against a witness or a person not a party to the suit, the practice is to entitle the order for attachment and all subsequent proceedings thereon in The People, on the relation, etc. *Stafford v. Brown*, 4 Paige, 360.

§ 2157. *A court having fined a party for contempt has power to order him imprisoned until the fine is paid. Authorities reviewed.*

(3) It is contended that, as the order of February 17th, adjudging the contempt, ordered that the defendant pay, as a fine, the amount of all costs, etc., and did not order that the defendant stand committed, etc., the order of March 13th was void, because it ordered the defendant to stand committed, etc. It is also claimed that the court exhausted its power in making the order of February 17th, and that, even if it did not, it had no power to order the defendant to be committed until the fine should be paid.

The order of February 17th adjudged the guilt, and ordered that the defendant should pay, as a fine, what should, on an investigation ordered, be ascertained to be the amount of certain expenses. The order did not specify any amount as a fine. The subsequent order specified the amount ascertained on the investigation, and ordered that it be paid by the defendant as a fine for the contempt, within thirty days from the order, and that, if not paid, the defendant stand committed till it be paid, and that, when paid, it be paid over to the plaintiff in reimbursement.

It is suggested that section 725 provides for the punishment of a contempt by fine *or* imprisonment, and that, therefore, a commitment for non-payment of the fine is unlawful, because such commitment is imprisonment. There is,

however, no commitment or imprisonment if the fine be paid. There is not commitment *and* fine. The punishment by fine is fully inflicted, under the terms of the order, if the fine be paid as the order directs, and, in such case, there can be no commitment. So, if there be a commitment for non-payment of the fine, there must be a discharge as soon as the fine is paid. The payment of the fine is the punishment. The awarding or infliction of the fine is no punishment. The commitment is an incident of the fine. It is not, in any manner, the "imprisonment" allowed by the statute. The payment of the fine and a commitment for not paying it cannot co-exist. The commitment is not a separate punishment or imprisonment added to the payment of a fine. It is in this view that it has always been held, that, where a statute authorizes or prescribes the infliction of a fine, as a punishment either for a contempt of court, or for a defined offense, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction.

In *United States v. Hudson*, 7 Cranch, 32, 34, it is said that the implied powers of fining for contempt and imprisoning for contumacy are powers which cannot be dispensed with in a court because they are necessary to the exercise of all others; that they result from the nature of courts of justice; and that, so far, our courts possess powers not immediately derived from statute. *Ex parte Robinson*, 19 Wall., 505, 510 (§§ 2147-49, *supra*). It might properly be held that the order to commit the defendant for non-payment of the fine was a punishment ordered for contumacy or contempt in not obeying the order to pay the fine, and so a punishment for a second contempt, and not a punishment for the contempt of violating the injunction. But the order to commit was lawful on broader grounds.

In *Kane v. The People*, 8 Wend., 203, 215, it is said that, where a defendant is convicted of a misdemeanor, he may be committed to prison until the fine imposed on him for the offense is paid. In *Ex parte Watkins*, 7 Pet., 568, 575, the existence of the same practice, at the common law, is recognized. In *Son v. The People*, 12 Wend., 344, on a conviction for a misdemeanor, a fine was imposed, with an order that the defendant stand committed until the sum be paid. The court might have imposed a fine, or imprisonment not exceeding six months, or both. On *certiorari*, the supreme court held that the proceeding was regular; that the imprisonment awarded was no part of the punishment, but only a mode of enforcing payment of the fine; and that if the fine was paid on the defendant's being arrested, the sentence gave no authority to imprison. In *Harris v. The Commonwealth*, 23 Pick., 280, it is held that where, for an offense, the punishment is a fine, without imprisonment, the settled rule of law is that the sentence is to pay the fine or stand committed until that sentence be performed. In *Wilde v. The Commonwealth*, 2 Met., 408, 411, it is said that, where the statute authorizes a punishment by fine, costs may be awarded as incident, and the party convicted may be committed till such fine and costs be paid. In *Regina v. Dunn*, 12 Ad. & Ell. (N. S.), 1026, the defendant was indicted for an offense and convicted, and sentenced to be imprisoned for eighteen months, and to give security to keep the peace for two years, after the expiration of the eighteen months, and to stand committed till he could give such security. The exchequer chamber, on a writ of error, held that the sentence was proper. In the case of *Drayton and Sears*, 5 Op. of Att'y-Gen., 597, cited in *In re Mullee*, 7 Blatch., 23 (§§ 2176-78, *infra*), they were convicted on an indictment under a statute which imposed only a pecuniary fine for the offense. A fine with

costs was inflicted, and the court ordered them to be imprisoned till the fine and costs should be paid. They were imprisoned for four years, and they applied to the president for a pardon, and the attorney-general, Mr. Crittenden, was of opinion that the president had the power, by pardon, to discharge them from prison and to remit the fine, although by the statute one-half of the fine was to go to a private person and the other half to a county.

In *United States v. Robbins*, 15 Int. Rev. Rec., 155, the defendant was convicted on an indictment, and sentenced to be imprisoned for a year, and to pay a fine and costs, and to stand committed until the fine and costs should be paid. After the expiration of the year's imprisonment, the fine and costs not being paid, and the defendant being still in jail, he was brought up on *habeas corpus*, and claimed that the part of the sentence which ordered him to stand committed until the fine and costs should be paid was void. The statute authorized both a fine and imprisonment. The court held that where a statute imposes a fine, the power to commit a person convicted of the statutory offense to jail until the fine is paid is an inherent power in the court. In *United States v. Kellerman*, 23 Int. Rev. Rec., 202, the defendant was convicted on an indictment, and sentenced to pay a fine and the costs of the prosecution, and to stand committed until said fine and costs be paid, and to be imprisoned for one month. After the defendant had suffered the imprisonment for one month, he sued out a writ of *habeas corpus*. The statute authorized the imposition of a fine and costs and of imprisonment for a specified time, but said nothing about commitment until the fine and costs should be paid. The court held that the judgment for commitment was proper, and that, as the fine and costs had not been paid, the defendant was rightfully in custody.

The foregoing cases were not cases of contempt of court, but, as a fine for a contempt of court is a judgment in a criminal case, the same rule applies. In *In re Mullee*, 7 Blatch., 23 (§§ 2176-78, *infra*), the party was fined for contempt in violating an injunction restraining the infringement of a patent, and was ordered to stand committed until the fine should be paid. In *In re Allen*, 13 id., 271, the party had disobeyed an order of court requiring him to produce and surrender certain books and papers. He was adjudged guilty of contempt and was ordered to deliver them up and to pay the costs, and, upon refusal, to be committed to custody by the marshal until discharged by order of the court. On *habeas corpus*, it was urged that the imprisonment was illegal, because it was to continue during the pleasure of the court. The court say: "When the contempt consist of a violation of the order of the court, and is a contempt not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of the court, or until further order of court. *Green v. Elgie*, 8 Jurist, part 1, 187, per Denman, C. J.; opinion of Ch. J. Kent, in *In re Yates*, 4 Johns., 317; S. C., 9 Johns., 395." Ch. J. Kent, in *In re Yates*, says that as it is the established course, in matters of contempt, to receive the submission of the party whenever he is ready to offer it, and on reasonable satisfaction made to discharge him, an order to commit him during the pleasure of the court is favorable to him, for if a definite time is fixed in the sentence, the court cannot alter it even on his submission. This was said in a case where the sole punishment inflicted for a contempt of court was imprisonment until the further order of the court. The principle applies *a fortiori* to the present case, where submission may be made by paying the fine, and where the commitment must terminate when the fine is paid. In *Green v. Elgie* (above cited), also reported in 5 Ad. & Ell., N.

S., 99, the court of review in bankruptcy ordered one Green, a party before it, to pay certain costs within four days, or in default to stand committed to prison. He was committed. Afterwards, he sued in the queen's bench, for false imprisonment, the person on whose application he was committed and his attorney. There was a verdict against the latter. One ground urged for sustaining the verdict was, that the warrant of commitment was void, because it did not direct how long the party should remain in prison. The court held that, in that respect, there was no objection to the warrant, but it was held bad because the order on which it was founded did not adjudge a contempt or direct anything to be done by the party to clear himself from it. In *Doubleday v. Sherman*, 8 Blatch., 45, a fine was imposed for contempt in the violation of an injunction, and the defendant was ordered to stand committed until the fine should be paid.

It must, therefore, be held that this court had power to order the defendant to be committed until the fine should be paid. It is equally clear that the court did not exhaust its power by the order of February 17th. That order adjudged the contempt and set on foot a proceeding for ascertaining what amount of pecuniary fine should be imposed therefor, directing on what principle and by what means it should be fixed. The subsequent order of March 13th fixed the amount, imposed it as a fine for the contempt, to be paid within a fixed time, and ordered commitment till payment. This was proper and regular.

All the points urged in favor of the motion made by the defendant fall within the foregoing considerations and the motion must be denied. The motion of the plaintiff is granted.

FANSHAWE *v.* TRACY.

(Circuit Court for Illinois: 4 Bissell, 490-500. 1868.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The question argued is of considerable practical importance. The practice in this district has been, when affidavits are presented charging a person with the violation of an order of the court or of an injunction, for a rule to show cause to issue, requiring him to appear in court and furnish some good reason why an attachment should not be issued against him. It has also been supposed to be within the power of the court to issue an attachment in the first instance without the necessity of a rule to show cause.

A bill was filed by Edward R. Fanshawe against the Chicago, Rock Island & Pacific Railway Company and other parties, in March last, and, as the bill asked for an injunction among other things, some of the parties appeared in court, and the usual order was taken, according to the practice of the court, that nothing should be done prejudicial to the rights of the plaintiff until the motion for an injunction should be heard. This practice has been very commonly adopted where the plaintiff or the court is not ready to hear the motion, or to enable the defendant to prepare for the hearing, so as to protect the rights of the plaintiff. It has been supposed that in this way the rights of all parties would be protected; and, where special injunctions are asked, the act of congress and the rule of the court require that notice shall be given. In this way all parties have an opportunity of being heard before the injunction is issued. At the same time, it is apparent that irreparable injury might be done to the rights of the plaintiff, provided the order of the court which is entered

in such case should be disregarded. Therefore it is that this practice has prevailed — a practice which I must think is a salutary one and calculated to promote justice.

After this order was made a supplemental bill was filed. New parties were added and some new facts were stated. There were such circumstances stated in the supplemental bill, that, on application of the plaintiff, an attachment was issued against certain parties, and a rule to show cause issued as to others, for an alleged disobedience of an order of the court. I do not propose at this time to go into the propriety of the order of the court then made. In point of fact, none of the parties against whom the attachment was directed have been arrested, and some of the parties against whom the rule to show cause was entered have appeared and filed affidavits. All of the parties, or nearly all, have appeared and have objected to the order of the court made at the time on various grounds which I propose now to consider.

§ 2158. *It is allowable, under the ninetieth equity rule of the supreme court, to issue a rule to show cause against an attachment instead of entering an order of committal and serving notice.*

In the first place it may be necessary for us to examine the ninetieth rule of the supreme court in cases of equity, because it is upon that rule that the parties rely, as showing that the practice adopted by the court in this case was irregular and improper and ought not to have been adopted. That rule is as follows: "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local convenience where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

Of course the first question is: What was the rule in England in the high court of chancery? Mr. Daniell says, "The remedy in the event of the breach of an injunction or restraining order is by committal." 2 Daniell's Ch. Pl. and Pr., 1683. "The order for committal is obtained upon motion, of which notice must have been duly served personally upon the person committing the contempt," and it is to be observed that "the terms of the notice of motion should be that the party 'may stand committed' . . . for breach of the injunction" (2 Daniell's Ch. Pl. and Pr., 1685), and not that he may show cause why he should not be committed. Rather refined reasoning, it must be confessed. The notice must be that the party may stand committed, and not that he may show cause why he should not be committed. "The plaintiff may also, it seems, obtain an order *ex parte*, that the defendant may stand committed on a certain day unless he shows cause against it, which order must be personally served upon the party to be committed." Id. So this is an addendum which has been made under the practice in England, according to this order, that the plaintiff may obtain an order *ex parte* that the defendant may stand committed on a certain day unless he shows cause against it; that is, the party may take a rule *nisi*.

§ 2159. *Practical effect of both methods the same.*

It would seem that, so far as the defendant is concerned against whom the proceeding is sought, it is not really worthy of controversy whether he is served with a notice that the motion will be made in court that he stand committed for a breach of the injunction, or is served with a rule to show cause why an attachment should not issue against him for the breach. If there is

any difference, the latter is in his favor, being not so direct and peremptory as a notice of a motion that he be committed, because when that motion is heard, unless he gives a satisfactory reason, he is committed of course; whereas, in the other instance, a rule to show cause might be asked in the first place, then an attachment be issued, and, when brought in under attachment, he has a right to purge his contempt. In the first place, then, the court may refuse to issue the attachment, and secondly, the court may refuse to commit when the attachment is returned. In the last instance, different from what it is in the other, when the notice is given that he stand committed, the party may pay no attention to it; the court may not have absolute power over the offender; but where the attachment issues, and he is brought into court, if he does not purge himself of the contempt, then the court has control over him; and so concerning that rule there does not seem to be very much difference in the mode of practice.

§ 2160. *Practice in other districts.*

Mr. Justice McLean has said (*Worcester v. Truman*, 1 McL., 483) that a rule to show cause why an attachment should not issue for breach of an injunction was not the mode of proceeding in that court, but that it should be a motion that the defendant stand committed for the breach of injunction, and notice given of that motion, following in this respect a case decided by Lord Eldon, which (*Angerstein v. Hunt*, 6 Ves. Jr., 488), however, seems to have been a modification of the old practice, because Mr. Daniell admits that the old practice was that the attachment might issue and not notice of the motion; that is, the attachment might issue in the first instance. Mr. Justice Miller has also followed the decision of Lord Eldon and of Mr. Justice McLean in holding that there should be a notice of the motion that the party stand committed for the breach of the injunction. *Gray v. Chicago, Iowa & Nebraska R. R.*, 1 Woolw., 63.

As I have already said, there is a great deal of refinement in the distinction between the two cases. The practice in this district for twenty years, and perhaps longer, has been for a rule to show cause to be entered in the first place; and the question is whether this comes so directly in collision with this ninetieth rule of the supreme court, that, after a rule to show cause has been issued, we are to abandon the whole proceedings, and quash them simply upon that ground. I think that the case comes directly within the ninetieth rule of the supreme court, which is that where the rules prescribed by "that court, or by the circuit court, do not apply," the practice in the high court of chancery in England is to apply. If there be a distinct rule of this court applicable to this case, it is within the exception of the ninetieth rule, and the practice of the court, I think, is to all intents and purposes the rule of the court. Certainly the difference between the two is not so material, nor important, nor attended with such serious consequences, as to make it indispensable that the court should drop a practice which has been followed for so many years, and for the reason that I have already given. It is really a distinction without any substantial difference,—a notice of motion why the party should not stand committed for contempt, or a rule to show cause why an attachment should not issue. Whatever difference there is, is in favor of the defendant.

I do not, therefore, feel inclined, simply because a different practice has been followed in other districts, to abandon a practice which has been pursued for so many years in this district. I have no sort of objection, certainly, that the practice of the court should be in accordance with the practice adopted by

Judge McLean in Ohio, and Judge Miller in Iowa. I submit the question to my brother judge, and if he thinks there is any material difference, and that it is desirable the practice throughout the districts should be uniform, I am perfectly willing that the practice in this district should conform to that of other districts. But still, it is simply a matter of practice, the courts reaching the same conclusion in a little different form, and in no essential particular jeopardizing by the change of form the rights of the parties.

Besides, the language of the rule is express, that the practice of the high court of chancery of England is not to be regarded as positive rules, but as furnishing just analogies; so that it would be competent, I apprehend, for this court to adopt its own practice in relation to this matter. If it were a question *de novo*, coming up for the first time, it would still be competent for this court to make its own rule upon the subject, even under the express authority of this ninetieth rule in equity. This being so as to the first point, the next question is, whether it is competent for the court to issue an attachment in the first instance, instead of a rule to show cause.

§ 2161. *It is within the discretion of the court to issue an attachment in the first instance without a rule to show cause.*

The practice has been very general to issue in the first instance a rule to show cause. At the same time, as I apprehend, it has not been doubted — and I do not feel inclined now to doubt, even after the argument of the counsel in this case — that the power exists in the court, under circumstances where in its opinion such an order is necessary, to issue an attachment in the first instance without issuing simply a rule to show cause. I think the practice in this state is quite common, in the courts of chancery, for an attachment to issue in the first instance. It certainly was familiar to me in my practice when I was at the bar, and some cases have been cited from the supreme court where it appears to have been done. Though it is not and ought not to be regularly done, I cannot doubt the right of the court to issue the writ, and it seems to me that there might be circumstances where the court might be shorn of its power to give remedial justice unless it possessed the authority to issue an attachment. That being so, it is simply a question of discretion on the part of the court. Of course it is always competent for the parties to come in and ask the court to revise its judgment and opinion in a particular case, and it will always afford me pleasure to give counsel an opportunity of being heard in any such case.

§ 2162. *A supplemental bill does not waive an order of court against the defendant, unless inconsistent with the action of the court.*

Then as to the effect of the supplemental bill which was filed: It is claimed that that was a waiver of the order of the court. I do not well understand how that could be true in this case, because after the order of court was made upon the filing of the original bill, the supplemental bill, containing allegations which appealed to the court for its remedial power over the parties, was filed for the purpose of compelling them to observe the order of the court already made. It would be a singular state of facts that an amendment to a bill in which the court was called upon to interpose its strong arm to enable a party to have redress in a particular case was to operate *ipso facto* to defeat the whole object sought. I concede that there may be cases of an amendment to a bill, or of a supplemental bill, where it would be a waiver of an order of the court or of an injunction, as in the case cited where the party was under an order to answer, and an amendment of the bill was made which would affect

the answer. In such a case as that it would undoubtedly be a waiver of the order to answer, and if the party was in contempt it might be a waiver of the contempt. The true rule, I take it, is this: that, where the amendment to the bill or character of the supplemental bill affects substantially the order of the court, and brings up facts which are inconsistent with the action of the court, that would constitute a waiver of the contempt or of the injunction, but not otherwise.

Then, as to the third point: That point is, I apprehend, well taken. It was not the intention or the purpose of the court that this order should operate upon any other party or corporation than those within the jurisdiction of the court, and who had had notice of the proceedings in court. It was not intended to operate upon any foreign corporation.

§ 2163. *Contempt as an offense against the United States.*

Perhaps it may be proper for me to make a few remarks upon the general scope and effect of the proceedings for contempt, about which there seems to be some difference of opinion. As I understand it, a party against whom proceedings for contempt are instituted—a party who has conducted himself in such a way as to justify the court in punishing him for contempt or for the disobedience of its order—has committed an offense against the United States. The court is the mere instrument or organ of the government in punishing the person for the offense which he has committed. As I said during the argument, if he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by the court, the fine goes to the United States, and although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars. The parties may not have, do not have, absolute control over that proceeding. The United States is the party to the proceeding, and not the mere defendant or plaintiff upon the record. It is not a crime in one sense, but it partakes of the nature and character of a crime, and I do not see, with all due respect to some of my brother judges who differ from me, why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail, and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States.

The supreme court of Pennsylvania, in a case which was quite notorious at the time,—the case of Passmore Williamson, 26 Penn. St., 9, where the district court of the United States had imprisoned a party for a contempt of the district court,—says, on an application to release him from his imprisonment: “The commitment shows that he was tried, found guilty, and sentenced for contempt of court, and nothing else. He is now confined in execution of that sentence, and for no other cause. This was a distinct and substantive offense against the authority and government of the United States.” If it is not, what is it? What is the nature and character of the offense that the party has committed? Is it an offense against a party to the suit? Not so. It is true that the party to the suit may ask the punishment of the offender, with a view of promoting the civil remedy, but that is not the sole object sought in punishing the offender. That is not the meaning of the law of the United States which declares that a court can punish the offender by fine and imprisonment, and as to the law of 1831, which was referred to, the power of the court as to this is not changed by that law. The supreme court of Pennsylvania further says in the same case, “It must be remembered that contempt of court is a

specific criminal offense." I do not go quite so far as that, but I say that it partakes of the nature of a criminal offense.

§ 2164. *The officers of a corporation are not in court for the purpose of punishment for contempt, unless they have knowledge of the action of the court upon the corporation.*

But the supreme court of the United States in *Ex parte Kearney*, 7 Wheat., 38, speak of the punishment, not as a judgment in the case of a contempt, but as a conviction, as though the party were tried for crime. They say that the order of the court imprisoning or fining the party is a conviction, and that case is cited in the case of *Williamson*, *ante*. That court says, "the contempt may be connected with some particular cause," etc. But in point of fact the practice in this state always is, in case of contempt, a proceeding on the part of the people; and the practice has been in this court to treat it as a proceeding on the part of the United States.

There has never been an order against anybody not in court. The officers of a corporation are part of the corporation, and when a corporation is in court the officers for certain purposes are also in court; but I do not understand that such officers are in court for the purpose of punishment for contempt unless they have knowledge of the action of the court upon the corporation, so that if any of the officers are in court simply from the fact that they are such officers, they are not legally in court to be punished for contempt unless they had notice of the order of the court. If there is service upon the corporation, and any of the officers, knowing of the order of the court, disobey the order, I think they are guilty of contempt and are punishable for the contempt, although there may be no personal service upon them, because the corporation is in court, and they are also in court for that purpose if they had notice.

According to the opinion of the district judges of the southern district of New York and of Iowa, the parties who reside in those two districts cannot be reached in any way at present, as they think there is no authority, for various reasons (they differ, I believe, as to the reasons), to arrest them and transfer them to this district; but as the matter now stands, whenever these parties come within this district, I hold that it is competent for this court to arrest them and bring them before the court. Therefore, of course, it is desirable that they should understand the view of the court, and that it will always be competent hereafter to cause these parties, whenever they come within its jurisdiction, to be brought before this court.

IN RE JUDSON.

(Circuit Court for New York: 3 Blatchford, 148-152. 1853.)

STATEMENT OF FACTS.—Motion for an attachment against Judson, to compel him to answer questions as a witness *de bene esse*, which he had declined to answer on the ground that his information had been acquired as an attorney at law, and he claimed the privilege of an attorney in that matter.

§ 2165. *Attachments in contempt will only be granted in clear cases and upon full proof.*

Opinion by BETTS, J.

It is a cardinal principle, in relation to the summary and imperative proceeding by attachment, that that writ will not be granted unless a case of clear

contempt be established. When the contempt is not committed in *facie curiæ*, it must be proved by affidavits from persons who witnessed it. 7 Dane's Ab., 307, 308, ch. 220, art. 4. The evidence accompanying the papers on this motion proves no other fact than the refusal of the witness to answer the question propounded. There is nothing tending to show the connection of the inquiry with the subject-matter of the action or defense, and the motion is urged upon the assumption that the witness was bound to answer the interrogatory, whatever might be the character of the disclosure obtained by it, and has committed a contempt of court by refusing to do so.

§ 2166. *What must appear to justify the commitment of a witness for contempt.*

I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt or commit him therefor, it will require more than proof of the fact that he declines to respond to a question. It will inquire whether the question is relevant and material to the case or hearing (1 Greenl. Ev., § 319); and also whether the witness is legally exempt from answering it. No contumacy can be imputed to him until these points are determined. The law gives no color to the practice, which not unfrequently intrudes upon judicial proceedings, of besetting a witness with impertinent inquiries, calculated to pry into his private affairs, or into his own character, or that of other persons, or to subject him to personal liability, when the inquiries are not shown to have a legitimate bearing upon the cause on trial; and it is guarded in coercing answers to questions when their materiality is not clearly manifest. In this case the court will not suspect any improper motive in the party pushing the inquiry which was resisted by the witness, nor, on the other hand, is it furnished with means to determine that the witness refused to answer from a refractory or contumacious disposition. It is enough to say that the party who invokes the court to order the witness to be imprisoned until he consents to give the testimony demanded has omitted to prove that such testimony might be relevant and material to the issue in the cause. The English court of exchequer refused an attachment against a witness for not attending the court upon subpoena, although the affidavits asserted that his evidence was material and necessary for the party who subpoenaed him, because of the immateriality of the evidence sought for, and also because the affidavits did not specify in what respect the evidence was material (*Dicas v. Lawson*, 1 Crompt., M. & R., 934; S. C., 5 Tyrwh., 235); and an action cannot be maintained against a witness by the party who subpoenaed him, for refusing to appear and testify, without proof that his testimony was material. 3 Daniell's Ch. Pr., 27.

§ 2167. *The same powers may be exercised on ex parte examinations as the court itself exercises, but not more than these.*

The counsel for the motion urges that it belongs to the court in Massachusetts, on the return of the deposition, to determine whether the evidence is pertinent to the case, and that that court will exclude the evidence if it is found not to be pertinent. This argument is correct, in so far as it relates to the conduct of the commissioner. That officer must write down and return to the court any species of evidence offered before him, and the court will receive or reject it according to the rights of the parties. But most serious mischief may be in that way effected, if a witness is compellable, in all cases, to answer, in the first instance, all questions put to him. He may be thus compelled to

make public important secrets in relation to the rights or character of himself or others, which the party extorting them has no title to or interest in, and which are drawn out through a course of interrogation that would have been peremptorily arrested had the examination taken place in open court.

These *ex parte* examinations cannot claim privileges or powers which the court they are designed to aid could never exercise itself. This court interposes its authority, to compel witnesses to attend before commissioners and give evidence there under the provisions of the thirtieth section of the judiciary act of 1789, which declares that any person may be compelled to appear and depose before a commissioner, in the same manner as to appear and testify in court. Accordingly, a refractory or reluctant witness, who has been duly subpoenaed to attend for examination before a commissioner, will be made to obey the order, to the same extent as if the writ of subpoena had been returnable to this court. There is nothing in the law, or in the reason of the case, which supplies a different authority, in respect to *ex parte* evidence taken out of court, from that which legally appertains to the court in proceedings before it. The act places both on the same footing.

I do not determine other points raised and discussed on the argument, as to whether a commissioner can take depositions except under an express order of court made in a cause, or under a commission; as to whether the issues between the parties in the cause must be before the commissioner; as to whether a witness can object by demurrer to questions proposed, or is competent to take, on his own part, the exception that questions put to him are irrelevant to the case; nor as to whether the facts set up by the witness in this case establish a privilege in Goodyear, his client, which prevents the witness from testifying to the matter inquired of. My decision is placed on the ground that there is no evidence before the court that the question which the witness refused to answer had any materiality whatever to the cause, and that this court ought not to award the high writ of attachment, to draw out answers to questions which may turn out to be frivolous and impertinent. There must exist a plain reason for believing that the ends of justice may be frustrated by the recusancy of a witness, unless his reply be coerced to an interrogatory, before the court will subject him to the summary and imperative process of attachment. The motion is denied, with costs.

IN RE MAY.

(District Court, Eastern District of Michigan: 2 Flippin, 562-571. 1880.)

STATEMENT OF FACTS.—May was held to answer to a charge of contempt of court, in that he, notwithstanding the express charge of the court, talked to the defendants in the cause in which he had been sworn as a juror, and permitted the defendants to talk to him on the subject, and entered into a negotiation tending to effect a disagreement of the jury. May's answer was in effect a general denial of disobedience of the court's orders, but stated in great detail how he had been corruptly approached by Miller, who acted on behalf of the defendants. He admitted, also, interviews with Burnstine and Rothschild (the defendants) on the subject of Miller's attempt to corrupt him.

§ 2168. *Powers of federal courts to punish for contempt under statutes and at common law.*

Opinion by BROWN, J.

By Revised Statutes, section 725, the power of the federal courts to punish for contempt is limited to three classes of cases: 1. Where there has been a

misbehavior of a person in the presence of the court, or so near thereto as to obstruct the administration of justice. 2. Where there has been misbehavior of any officer of the court in his official transactions; and, 3. Disobedience or resistance of any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. *Ex parte Robinson*, 19 Wall., 505, 511 (§§ 2147-49, *supra*).

It is not necessary here to discuss the question whether, in the absence of the express order of the court to the jury to refrain from conversing with any one regarding the case, a juror could be punished for such misconduct. It would seem, however, that such misconduct might be reached under the first class of cases as a misbehavior of a person so near the presence of the court as to obstruct the administration of justice therein. The act does not define how near the court the misbehavior must be, nor the character of such misbehavior, and I think it may be fairly construed to extend to any misbehavior by a juror in his capacity as such, since such misbehavior tends to obstruct the administration of justice. Otherwise, it would be impossible for the federal courts to punish a juror even for receiving a bribe, since there is no statute making the receipt of a bribe by a juror a crime. The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials. It seems to me it could not have been the intention of congress, and I would not infer it to be the intention of congress, to take away from the courts the common law power of punishing jurors for misconduct. Upon this point, however, I express no opinion, as it is admitted there was an order given, and the only question is whether the respondent has disobeyed it.

§ 2169. *The answer of a respondent in proceedings for criminal contempt must be taken as true, but it must be credible and consistent.*

It is a cardinal rule in proceedings for contempt that the answer of the respondent cannot be traversed and must be taken as true. If false, the government is remitted to a prosecution for perjury. 4 Black. Com., 287; *In the Matter of Pitman*, 1 Curt., 186; *United States v. Dodge*, 2 Gall., 313. But the answer must be credible and consistent, and if the respondent states facts which are inconsistent with his avowed purpose and intention, the court will be at liberty to draw its own inferences from the facts stated. In the *Matter of Crosley*, 6 Term R., 701; *Ex parte Nowlan*, 6 Term R., 118. For instance, if the respondent in this case had stated that, in his interview with Burnstine, he had asked and received a thousand dollars, and had kept the money in his pocket until after the jury were discharged; and had further stated that he did this for the purpose of delivering the money to the district attorney and prosecuting Burnstine for bribery, it would scarcely be contended that the court would be bound to draw the same inference from his conduct. So, then, it is after all a question in every case, whether the facts stated are consistent with an honest intent.

§ 2170. *Accused found guilty on inferences from the facts set out by himself.*

The prosecution insist, in this case, that Miller was a myth; that respondent's story with regard to his interview with him was concocted solely for the purpose of explaining the subsequent interview with Burnstine. The court, however, cannot accept this theory. I must take it for granted that the interview with Miller was had substantially as stated. Respondent had no power to prevent Miller from conversing with him as he did, and suggesting that money might be made out of the case, but respondent should at once have disclosed the fact to the court, or at least he should not have assumed to take on

the character of a detective and work up the case for the government, without consultation with the officers of the government. If, as Miller said, he had been present several days during the trial, he was probably present during some of the days that succeeded his interview with the respondent, and might have been identified. Respondent, however, seems to have made no effort to ascertain whether Miller was in the court room, but keeps the facts to himself, and at the most critical moment of the trial, after the arguments had been concluded, and the evening before the jury were to be charged, goes to the house of one of the defendants after dark, to ascertain whether Miller represented him or any of the other defendants in the case. What business was it to him whether Miller was sent by the defendants or not? Suppose he had been sent by Burnstine, what was the respondent to do about it? He was not even content to take Burnstine's word that he knew nothing about Miller, but consented to make another visit at a late hour in the evening, in the mean time suggesting to Burnstine to see Rothschild and see whether he knew anything of Miller. The records of the court show that the jury in this case disagreed. It does not, of course, show how they stood, but the respondent in his answer admits that he continued to vote for an acquittal until the end. Suppose a verdict of guilty had been rendered, or, to put the case stronger, suppose it had been a civil case and a verdict had been rendered for the defendants, would it not have been the duty of the court, on respondent's own showing, and to put the most favorable construction upon it, to have granted a new trial on account of his misbehavior? It seems to me entirely clear that it would. Without looking at the affidavits upon which this order was issued, and which shows a somewhat different state of facts, it seems to me clear, beyond a reasonable doubt — I might almost say beyond the shadow of a doubt — that respondent went to Burnstine's house, not for the purpose of detecting Miller or any other person, but rather with the intention of entering into a corrupt negotiation with Burnstine.

The respondent is, therefore, adjudged guilty of the specification charged in the order to show cause, viz.: Going in the night-time to the house of one Marcus Burnstine, one of the defendants, for the purpose of corruptly conferring with said Burnstine, of and concerning said cause and of and concerning the verdict thereafter to be rendered therein. And he is further adjudged to pay a fine of \$100, and to be committed to the Detroit house of correction until the terms of the sentence are complied with.

IN RE CHILES.

(22 Wallace, 157-169. 1874.)

STATEMENT OF FACTS.— White and Chiles, during the rebellion, made a contract with the "military board" of Texas, by which the board, for and in consideration of munitions of war, sold them seventy-six United States bonds of \$1,000 each, the property of the state of Texas, then in the hands of Droege & Co., of Manchester, England. After the war a suit was brought by the state of Texas against White, Chiles and Hardenberg, and a decree was rendered by this court quieting the title of plaintiff, and enjoining the defendants from interfering with the bonds or setting up any claim to them. Chiles, however, served a notice upon Droege & Co. that he claimed the bonds, and warned them not to surrender them, as he should test the title to them in an English

court. For this, as a violation of an injunction, he was held responsible in proceedings in contempt, and a motion to show cause, etc., was entered.

§ 2171. *Where a decree settles the title of complainant to certain bonds and enjoins defendant from setting up any adverse title, the latter is guilty of contempt in serving notice upon the holder of the bonds that he claims to own them.*

Opinion by MR. JUSTICE MILLER.

The object of the bill filed by the state of Texas in the case of *Texas v. White & Chiles*, and reported in 7th Wallace [700; CONST., §§ 140-160], was to establish the *title of the state of Texas* to the bonds there claimed, and her bill of complaint made parties, so far as she knew and could bring them before the court, all persons who denied or contested that title. The bill was framed as carefully and as fully as it well could be for the purpose of establishing that title finally and conclusively. If out of abundant caution the bill sets out all the false and pretended claims of the defendants, and the grounds on which they were supposed to be false, that were known to complainant, is the final decree in her favor to be of no avail because one or more of the defendants had another and a different ground of defense which he did not set up in his answer, nor in any manner make known to the court? Mr. White was called on by this bill to defend his *title*, his *whole title*, to these bonds, or to any part of them, or any interest in them. The prayer and object of the bill was to decide and determine the title, and to give all such relief as equity could give if the title was found in the complainant.

It would be to trifle with the court to make a proceeding in equity, designed to give full and final relief and to administer complete justice, to depend upon the skill and jugglery by which a defendant might conceal some part of his defense to that suit until it was decided against him, and then set it up as an excuse for disobeying the final decree of the court, or hold it out as the basis of another suit for the title or possession of the same bonds. And whatever difference of opinion may be found in the authorities on the nice distinctions involved in the question of what is concluded in suits at law, and without even the necessity of going as far as this court has gone in actions at law in holding that all that *might* have been set up as a defense in the action must be concluded by the judgment, we are of opinion that in such a case as this, in a suit in equity, when the obvious purpose of the bill is to establish and adjudicate the entire rights and title of the parties before the court to the bonds and their proceeds in all the forms in which they can be identified, the decree must be final and conclusive on all the rights of all the parties actually before the court.

As to the meaning of the decree on this subject it is too plain for argument. The first paragraph or order declares the contract with White & Chiles void, and enjoins them and the other defendant from asserting any right or claim under the same; and it establishes plaintiff's right to said bonds and to their proceeds. The second paragraph or order perpetually enjoins the defendants, including White & Chiles, from setting up *any claim* or title to any of the bonds and attached coupons which are described in that contract, but does not limit the prohibition to a title under said contract. There can be no use for these several orders of injunction except to make it certain that defendants are to assert no claim to these bonds, either under that contract or under any other claim or title.

In regard to the second ground of defense no authorities are cited by either side. The language of the enjoining order certainly is not limited to a prohibi-

tion of a suit in court. Nor are we satisfied that the purpose and object of the injunction would be obtained by such a limitation. The purpose of the suit was, as we have said, to establish the rights of plaintiff as owner of these bonds, and to prevent further interference or obstruction in the assertion of that right. As to all the bonds in the possession of the parties, or when they or their proceeds were within the control of the court, this purpose was attained by other orders and decrees.

But as to these bonds which were in England, all that the court could do was to prevent by injunction any interference of the defendants with the efforts of complainant to recover them, and that was the meaning of the enjoining order of the court. Is it obeyed or its purpose attained while one of the defendants asserts openly and continually, "I am the owner of these bonds notwithstanding the decree of the court; I shall in another jurisdiction maintain my right to them by all legal means?" That such a course would seriously embarrass the complainant in securing her right as established by this decree there can be no doubt. Would it be permitted when in a suit to quiet title to real estate defendant was enjoined from any further disturbance of that title or assertion of his own, that he could still continue to slander plaintiff's title, impair its validity and prevent its sale, because he stopped short of instituting a suit for the land? The very ground of bringing a suit to quiet title is that the disturber, while asserting a claim which is a cloud on plaintiff's title, refuses to carry it to the test of a trial in court, and because he refuses to do this a court of equity stops his mouth. This also is a bill to quiet title, and the defendant is forbid to set up or assert a title in conflict with complainant's. This prohibition is not obeyed where the defendant continues the annoyance and the injury in any form short of bringing a suit for the bonds.

Without determining how far a mere loose verbal assertion of a right to these bonds could violate the injunction, we are of opinion that the deliberate service upon those who had them in possession, of a written notice of his claim of ownership, with a reference to further judicial proceeding in support of it, is a violation of the injunction of the court in this case, and that the defendant, Chiles, is guilty of a contempt in that regard.

§ 2172. *Power of federal courts to punish for contempt.*

Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are "disobedience or resistance by any officer of the court, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts." Such has always been the power of the courts both of common law and equity. The exercise of this power has a twofold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. *Stimpson v. Putnam*, 41 Vt., 238. In the former case the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it.

We are asked by counsel for the state of Texas to act upon this latter principle in the present case. But it is not pointed out to us very clearly what act it is in the power of defendant to perform commanded by the decree and which he refuses to do. The bonds are not in his possession or under his control. He

cannot, therefore, deliver them up as the decree orders. There is no decree that he shall pay their value. The only order which he is shown to have violated is the one we have considered, enjoining him from setting up a claim to them. The petition for the present rule on Chiles asks that he may be ordered by a proper instrument in writing to convey and transfer to the state of Texas all rights, titles and interest which he appears or pretends to have in said bonds, and counsel in oral argument says he should be imprisoned for contempt until he complies with this order.

But the obvious answer to this is that no such order or decree has been made, and defendant can be guilty of no contempt in not doing this until he has been ordered to do it, and he is aware of it. To make an order now, and then punish for contempt or disregard of it before it was made, is *ex post facto* legislation and judicial enforcement at the same moment. It is true that the original decree contains a provision for further directions in the enforcement of it, and it may be that such an order as is asked for now would be made on proper application and proper notice to the parties concerned, but such a proceeding can constitute no part of process for contempt in disregarding an existing order of the court. The granting or refusal of such an order is governed by very different considerations, and is to be brought to the attention of the court by very different proceedings than such as belong to the one now before us.

We are left, then, to the consideration of what punishment we shall impose upon Mr. Chiles for the violation of this court's injunction in a suit to which he was a party, where he was fully heard and his rights conclusively decided. Without further comments, we think it our duty to order that he pay to the United States a fine of \$250 and the costs of this proceeding, and that he stand committed to the custody of the marshal of this court until said fine and costs are paid.

JUSTICES FIELD and HUNT dissented.

SECOR v. THE TOLEDO, PEORIA & WARSAW RAILWAY COMPANY.

(Circuit Court for Illinois: 7 Bissell, 513-525. 1877.)

STATEMENT OF FACTS.—Proceedings had upon the attachment of defendants for contempt of court. The facts are these: In January, 1875, the property of the Toledo, Peoria & Warsaw Railway Company passed into the hands of a receiver appointed by this court. In July of that year, the employees of the company were threatened with violence if they would not consent to join the strike then in progress. The receiver fearing that violence would be used to obstruct the running of trains, etc., applied to the court for protection, and the marshal was sent to Peoria, where the company operated its main line, with instructions to inform the strikers that the property of the company was in the custody of the court, and that all persons interfering therewith would be summarily dealt with—which, however, did not prevent a mob of strikers from taking violent possession of the company's depots and trains. Several of the strikers are now before the court. On the first hearing the defendants were found guilty and sentenced to imprisonment in jail for terms of from two to four months. A rehearing has now been granted.

Opinion by DRUMMOND, J.

The defendants were brought before the court some time since, for being engaged with others at Peoria, on the 26th of July last, in forcibly stopping the

trains of the Toledo, Peoria & Warsaw Railway Company, then in the possession of a receiver appointed by the court, and for preventing, by intimidation and violence, the employees of the company from performing their duties in the running of the trains. They were found guilty of the offense, and a penalty imposed by the court.

§ 2173. *When property is intrusted to a receiver, all persons have notice that it is in the custody of the court.*

The order of the court appointing the receiver and putting him in possession of the railway and its appendages required him to operate the road; indeed, he was appointed receiver for that special purpose among others; and the possession was exclusive in its nature — that is, it in effect prohibited any disturbance of the possession by unauthorized persons, so that the order of the court placed the railway in the possession of the receiver more effectually, if possible, under its safeguard and protection, than personal property in the hands of the marshal, held by virtue of an ordinary process, which requires him to do some specific act in relation to it. This is not usually ordered directly by the court, but is issued by the clerk at the instance of counsel, or of the party, and the court or the judge may, in fact, have no knowledge of its existence. But it is issued under the seal of the court and by its authority, and when the officer holds property under it, the process is a protection, both to him and to the property. Where property is delivered to a receiver, the authority of the court is directly impressed on it by its order or decree, entered of record, which is considered notice to all persons that it is in custody of the court through its receiver. The marshal, under ordinary process, holds the property for a limited time, subject to the requisition of the writ. The receiver holds it under a continuing order, which remains in force till rescinded or modified by the court.

§ 2174. *Wrongful disturbance of the possession of property held by a receiver is a contempt of court.*

The possession by a receiver of a railroad is not like the ordinary case of his possession of an estate or of a house to collect rents. The obligation cast on the receiver by the decree of the court is personal, and demands the continued, hourly control of the rolling stock by him, and therefore it is that any forcible deprivation, even for a time, arrests the order of the court by taking from him the means of compliance. The property being thus in possession of the court, it becomes its duty to protect the receiver in its use by all the means in its power, and, if he is deprived of it, to restore it to him by the necessary orders or writs of assistance to the marshal. And if that is unavailing, it can call on the general government to aid in enforcing its lawful process or orders. And among the means at the disposal of the court are summary proceedings against persons who unwarrantably interfere with property in its custody in disobedience of its orders. Therefore it is that it has been considered by all the authorities, the supreme court of the United States among others, that any wrongful disturbance of the possession of property held by a receiver is a contempt of the authority of the court, and punishable as such. So rigid is the rule that the court will not tolerate a seizure of the property by the process of another court, even though it may appear the party seeking it may have the right to it. Any one having a claim on it must make it in the court that holds the property, or obtain its authority to sue elsewhere.

§ 2175. *Considerations in imposing the penalty.*

The right of a court to punish summarily, by fine or imprisonment, for contempt of its authority, is undoubtedly a power requiring great caution in its

exercise, but it has always been considered that, in some form and with some limitations, it ought to exist. The court must have the means without delay to protect itself, its process and the property in its custody by punishing those who wrongfully and forcibly disturb the possession held under its authority. Something must be left to the discretion of the court. It must be a legal discretion, uninfluenced by passion or feeling. The object must be to maintain its authority for the present and in the future — not merely to punish. When this is attained, penalty should cease. The court should decide it as free from personal feeling as though it were a mere question of property between parties litigant.

Under our federal judicial system the power of the court to punish for contempt is limited to the misbehavior of any person in its presence, or so near as to obstruct the administration of justice; the misbehavior of its officers in their official acts, and the disobedience or resistance by any person to any lawful writ, process, order, rule, decree or command of the court. In addition to the order of the court placing the railway in possession of the receiver, there was on the 26th of July, a special order of the court requiring the marshal to prevent any interference with it, and to assist the receiver in retaining it, and restore it if he were deprived of the possession. But if the marshal, in restoring the property to the receiver, took possession of it, he, like the receiver, would hold it under the authority of the court, the difference being in the one case, as in the ordinary writ of assistance, it would be held by the marshal to be delivered to the receiver, and in the other by the receiver to execute the orders of the court, prescribing his duties pending the litigation — each being the officer of the court, subject to the performance of his own special functions.

Such has been the embarrassed condition of the railroads in this part of the country within a few years past that many of them are in the possession of the circuit court of the United States for this circuit, the gross annual earnings of which amount to more than \$15,000,000. This statement shows the magnitude of the interests intrusted to our care. The theory is that our possession is only temporary; but there is generally such a multitude of claims to be adjudged in each case, and so great are the difficulties in arranging conflicting rights among the mortgagees preparatory to a sale and reorganization, that it sometimes happens, in spite of the earnest efforts of the court to hasten the sale by foreclosure, that they remain in the custody of the court for some years. The Toledo, Peoria & Warsaw Railway Company has been in the hands of a receiver for more than two years.

It will be seen, therefore, that the forcible interruption of the traffic of so many railroads for days was a very serious matter, and the judges were of opinion, after the fact, that it was not possible to pass by so great an outrage upon the rights of property in our possession, by a reprimand or mere nominal punishment of the guilty persons. If it had been a few cars or engines that had been interfered with, it would have been different, but there was the business of many railroads for a time struck down by men who bade defiance to the law and to the authority of the court. There seemed to be a necessity to exercise the power vested in the court. If such things could be repeated, then was not only a great wrong done to those whose interests we were obliged to protect, but the government itself had ceased to accomplish one of the chief objects of its creation.

We could take no part in any supposed conflict between capital and labor, if there can be a conflict in a country where the laborer of to-day may be the

capitalist of to-morrow. All men are equal before the law. Neither the capitalist nor the laborer has a right to violate it. We personally desire that the laborer in all departments of life should obtain adequate reward for his services. What that should be, it was not for us as a general question to decide. We can only say that we found no sufficient excuse for the wrong done to the property in possession of the court. The men who committed it had no claim whatever to it, and if they had the result would have been the same. Those who may be said, in one sense, to own the property of the Toledo, Peoria & Warsaw Railway Company, and who will be entitled to its proceeds when sold, are the bondholders under the mortgages, but though many of them may be capitalists, still even they would be guilty of a contempt if they violently took possession of the property while in the custody of the court. It is the act committed that constitutes the offense, whether by capitalists or strikers; the forcible seizure of property not in the possession of an individual or of a corporation, but of the court.

But while these circumstances have influenced us to impose a penalty, we do not desire to continue it if the purpose has been effected — the maintenance of the authority of the court and the prevention of similar offenses hereafter. And after due consideration we have come to the conclusion, the court still being in session, that we may remit the penalty and discharge the defendants. The railroads have resumed their ordinary traffic. There seems at present no danger of future trouble. Railroad employees have returned to their duties. It is to be hoped that the lessons of the time have not been lost on the public, nor on employers or employees. The defendants have expressed regret for what has been done, and promise that the offense shall not be repeated. And then it is to be remembered that we consider only the disobedience of the orders of the court and not the general criminal act. And though the wrong done was great, still it is but justice to say that at Peoria, as elsewhere in this circuit, there was no destruction of property as at Pittsburgh; on the contrary, there were in some places earnest efforts made by the strikers to preserve property.

Again, we do not lose sight of the fact that at Peoria, as elsewhere in the circuit, persons who aided in depriving the receiver of control over the property did not fully realize the nature of the offense as against the court. They must to a great extent be held answerable for all the consequences which followed from their wrongful and violent acts, but it must be admitted that after a time, when they fully comprehended that they were obstructing the orders of the courts and the possible results, they relinquished the control of the trains and allowed the receiver to retake possession. In Peoria this was sooner accomplished than in some other places. So that, in view of these considerations, and with the concurrence of the district attorney and the counsel of the receiver, all the defendants will now be discharged on each one giving his own recognizance to observe the laws of the United States, and to abstain from all wrongful interference with any property in the possession of a receiver of this court for one year from this time.

IN RE MULLEE.

(Circuit Court for New York: 7 Blatchford, 23-29. 1869.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—On a motion for an attachment against the applicant as a defendant in a suit in equity in this court, he was adjudged to have been

guilty of a contempt of this court, by violating an injunction issued by this court, and, on the 27th of June, 1868, a fine of \$2,500 was imposed on him as a punishment for such contempt, and it was ordered that he should stand committed until the fine should be paid. After having been imprisoned for some time under such sentence he presented a petition to this court, praying for his discharge, on the ground that he was unable to pay the fine. The decision of the court thereon was that it had no jurisdiction or power to grant the prayer of the petition, and that relief must be sought by an application to the president of the United States.

§ 2176. *A contempt of a federal court is an offense against the United States, and after sentence is passed the sole pardoning power is in the president.* (See CRIMES, XXXIV.)

I then said: "By the constitution (art. 2, sec. 2, subd. 1) the president is invested with power 'to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' No such power is conferred upon any other officer or upon any court. A contempt of court is an offense against the United States. In the present case there is a judgment judicially declaring the contempt and offense. In *Ex parte Kearney*, 7 Wheat., 38, 43, the supreme court says: 'When a court commits a party for a contempt, their adjudication is a conviction, and their commitment in consequence is execution.' After a conviction and a commitment for a contempt the court has no more power to discharge or remit the sentence than it has in the case of a conviction and commitment for any other crime or offense against the United States. And such has been the practical construction of the provision of the constitution in regard to pardons. In the case of one Dixon a fine was imposed upon him by the circuit court of the United States for the district of Mississippi for a contempt of court. He applied to the president for a pardon. The attorney-general, Mr. Gilpin (3 Opinions of Attorneys-General, 622), decided that the pardoning power extended to such a case, and that the contempt was an offense within the language of the provision of the constitution. I fully concur in this view; and it necessarily follows that if the power of relieving from the sentence imposed on Mullee falls within the pardoning power of the president, it is exclusive in the president, and cannot be exercised by this court."

§ 2177. *Courts will decline to exercise the power of pardoning, at least until the executive department disclaims its own power so to do. Authorities reviewed.*

After this decision was made the applicant applied to the president for a pardon, and his application was entertained and denied. The denial was not put on any want of power in the president to grant the pardon asked for, but was based on the facts shown in the case. The application to this court to discharge the prisoner is now renewed. No new views are presented as to the power of the court to grant the relief asked, and I must decline to exercise the power invoked, at least until the executive department of the government disclaims its power to relieve the party by a pardon. From what took place in the case of Dixon, and what has transpired in this case, I must hold that the power of granting a pardon in a case like the present is claimed by the executive department as a part of its constitutional prerogative. From the report of the case of Dixon, it appears that the pardon was recommended by Mr. Justice McKinley, the associate justice of the supreme court of the United States whose circuit embraced at the time the district of Mississippi, and Judge Gholson, who was at the time the district judge of the United States for that

district. As the report states that the contempt was committed by an affray between Dixon and another person in the presence of the judges of the circuit court of the United States, at Jackson, in the state of Mississippi, it must be inferred that Mr. Justice McKinley and Judge Gholson were those judges. The punishment they inflicted was a fine, and, as they recommended the case to the president as a proper one for a pardon, they must necessarily have been of the opinion that they had no power to relieve the party. Nor is there any distinction to be drawn between the case of Dixon and the present case, growing out of the fact that in the case of Dixon the offense was an affray in the presence of the court, while in the present case it was a disobedience to a lawful process of the court. By the first section of the act of March 2, 1831 (4 U. S. Stat. at Large, 487), misbehavior in the presence of a court and disobedience to lawful process of a court are placed on the same footing, in respect of being contempts of court. The inquiry made of the attorney-general in the case of Dixon was whether the executive authority to pardon properly extended to that case. In his opinion given to the secretary of state in February, 1841, the attorney-general says: "If we adopt, as the supreme court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the president. I am, therefore, of opinion that, should the president consider the facts such as to justify the exercise of his constitutional 'power to grant reprieves and pardons for offenses against the United States,' there is nothing in the character of this offense which withdraws it from the general authority."

In the case of Rowan, 4 Op. Att'y Gen., 458, in 1845, Attorney-General Mason concurred in the opinion of Mr. Gilpin in the case of Dixon.

§ 2178. *If the president has not power to remit fines, he can at least discharge from imprisonment. Quære, whether a fine ordered paid to the plaintiff becomes a vested right in him like a judgment.* (See CRIMES, §§ 3270, 3275, 3333.)

In the case of Drayton and Sears, 5 Op. Att'y Gen., 579, in 1852, Drayton and Sears had been indicted and convicted in the criminal court for the District of Columbia and county of Washington, under a statute, on seventy-four indictments, each of them founded on the transportation of a single slave. On these convictions Drayton was sentenced to be fined in the aggregate, with costs, \$11,802.26, and Sears to be fined in the aggregate, with costs, \$8,686.12. By the statute, one-half of the fine in each case was to be to the use of the master or owner of the slave, and the other half to the use of the county school or of the county. On the rendition of the judgments Drayton and Sears were committed by the court to prison until payment of the fines and costs adjudged against them respectively. In pursuance of that commitment they were imprisoned in 1848, and they were still in prison when, in 1852, an application was made to the president for their pardon. The question being referred to the then attorney-general, Mr. Crittenden, as to the constitutional power of the president to pardon the men and discharge them from the penalties and imprisonment therefor to which they were sentenced, he decided: (1) That the pardoning power of the president extended over the whole case, and that by his pardon he might discharge them from prison and remit the fines for which they were imprisoned. (2) That, if the president could not remit the fines because they had become private property, he could still pardon and release the

offending parties from imprisonment, because such imprisonment was part of the proceedings against them as criminals, and at the instance of the United States, and was a thing distinct from any individual right of property in the fines. (3) That the president might pardon the offense and imprisonment, with an exception or saving as to the fines, in which case the fines would remain as a debt to the United States, or to those to whom the United States had granted or transferred it, and would be recoverable accordingly by the appropriate legal remedies, which remedies the distributees of the fines would have if they were entitled to any absolute right or property in the fines. The statute, in the case of Drayton and Sears, imposed only a fine, and the commitment to prison was ordered by the court to enforce the payment of the fines and costs. Mr. Crittenden examines the whole question with fullness, and adopts the view that the imposition of the fines, into whosoever pockets they might go when collected, was a punishment inflicted, on a public prosecution, for an offense against the United States, and must be regarded as having for its primary, if not its sole, purpose, the vindication of public law and public justice.

I have referred to this case of Drayton and Sears because it was suggested, on the argument, that, in the present case, the pardoning power of the president could not be invoked for the reason that, by the judgment of this court, the fine imposed on the applicant is to be paid to the plaintiffs in the suit out of which the attachment proceedings arose. The judgment of this court was, "that the said William Mullee has been guilty of a wilful and persistent disobedience to the order and injunction of this court, and that he be fined therefor the sum of \$2,500, the same to be paid to the complainants towards the reimbursement of their expenses in and about such attachment proceedings, and that he stand committed until the said fine be paid." In this particular the present case is like that of Drayton and Sears. The contempt of court was an offense against the United States, and the fine was inflicted as a punishment therefor.

If the right to the fine should be regarded as a vested private right in the plaintiffs in the suit, existing in the shape of a judgment, this court would have no right to discharge it.

In view of the action of the executive department in the cases referred to, I must again refer the applicant to the president. If the president shall disclaim all right and power, as a part of his constitutional prerogative, to grant any relief in this case, the matter may be again brought before me.

BLIGHT v. FISHER.

(Circuit Court for New Jersey: Peters, C. C., 41-43. 1809.)

STATEMENT OF FACTS.—Attachment against the plaintiff for contempt in causing a summons to be served on the defendants while they were in attendance on the court as parties. The service was not made in the presence of the court, actual or constructive.

§ 2179. *The privilege of a party attending court is exemption from arrest. Service of summons upon him is not a contempt, unless made in presence of the court.*

Opinion by WASHINGTON, J.

Mr. Stockton has taken the true distinction. The service of process, whether a *capias* or summons, in the actual or constructive presence of the court, is a contempt, for which the officer may be punished. But the privilege of a suitor

or witness extends only to an exemption from arrest. The privilege claimed being in derogation of the right of the other party to sue, the defendant's counsel were fairly called upon to produce some case to support his claim to the privilege. Third Inst., 6 Com. Dig., and 2 Stra., are obviously cases of contempt, from the circumstance of the process having been served in presence of the court. The doubt as to this fact in *Cole v. Hawkins* [Andrews, 275] is perfectly cleared up by referring to Andrews, where the case is more fully and correctly reported. It appears that the motion was not to discharge the party from the service, but for an attachment; and the court go expressly on the ground that the writ was served on the steps leading to the court, which was constructively in the presence of the court.

What Chief Justice Lee says in that case, in respect to the extent of the privilege, is clearly in answer to what had dropped from the counsel. If it be a case of privilege merely, it extends to the party *manendo* as well as *eundo et redeundo*. But, upon the main point, the opinion of the court is confined to the question of contempt. Second Lilly Ab. is the case of an arrest. The case of *Miles v. M'Cullough*, 1 Binn., 77, which alone induced the court to suspend the decision until this morning, has been examined, and it is as clearly the case of service in the presence of the court. The expressions of the reporter are, "the defendant, while attending *in this court*, upon an appeal, etc., was served," etc. The argument at the bar is not reported, but I can understand the case in but one way — that the party at the time of the service was in the presence of the court. The cases from Dallas' Reports relate to the claim of privilege by a member of the convention, and by a member of assembly. It is not for me to approve or to condemn those decisions. It is sufficient that the state courts of Pennsylvania have attributed to persons standing in public situations, such as those persons held, a degree of sanctity sufficient to protect them against the service even of a summons; and perhaps it was right to afford it upon considerations connected with the public good. But the defendants were not attending as members of the legislature, and would not, I apprehend, have been entitled, even in Pennsylvania, to as extended a privilege. In one of those cases the right to a continuance of his cause was considered as a part of his privilege; which, I apprehend, cannot be claimed by a suitor as such, though it may be granted him as an indulgence, in the discretion of the court.

On the other hand, the writers who speak upon this subject confine the privilege of suitor and witnesses to exemption from arrest, and not a *dictum* to the contrary is to be found.

Motion overruled.

§ 2180. Contempt a crime.—Contempt of a federal court is a crime under the thirty-third section of the judiciary act, and may be punished by the court by fine and imprisonment. *United States v. Jacobi*, 14 Int. Rev. Rec., 45.

§ 2181. Trial by jury.—Person accused of contempt is not entitled to a trial by jury. *King v. Railroad Co.*,* 7 Biss., 529.

§ 2182. Power of punishment under act of March 2, 1831.—The power to punish for contempt is inherent in all courts; but by statute of March 2, 1831 (4 Stat. at L., 487), it is limited in the district and circuit courts to: (1) misbehavior in court which obstructs the administration of justice; (2) to official misbehavior; (3) to disobedience of any lawful writ, process, order, rule, decree or demand. *Ex parte Robinson*, 10 Alb. L. J., 10.

§ 2183. Purging contempt—Perjury.—If a party purge himself from contempt in his sworn answer, he must be discharged. If his answers are untrue, he may be proceeded against for perjury. *United States v. Dodge*,* 2 Gall., 312.

§ 2184. If the prisoner purge himself by oath on his answer to interrogatories, no collateral evidence will be received to show him guilty of the offense; but if there is collateral evidence showing that the prisoner has perjured himself, he will be held to answer. *Ibid.*

§ 2185. **Intention.**—Contempt of court consists of the acts done and not of intentions. One who has not complied with an order of court to pay money into court, or furnish security therefor, cannot purge himself by answering that he was not wilfully guilty of a contempt. The disobedience itself is a contempt unless the party can show sufficient excuse for it. *Wartman v. Wartman*,* Taney, 362.

§ 2186. Disobedience to an injunction is a contempt of court. The question of *animus* can bear only on the punishment. So held where defendants disobeyed a preliminary injunction against manufacturing explosive powders infringing a certain patent. Defendants claimed that they did not know they were infringing and were advised that they were not. *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.*,* 9 Fed. R., 316.

§ 2187. When one who had been enjoined from infringing a patent made and sold an ingenious machine which he supposed, and was advised, did not infringe the patent, and he had no intention of infringing the patent, he was not fined, but ordered to pay all the costs of the application to judge him guilty of contempt, and he was so adjudged. *Carstaedt v. United States Corset Co.*, 13 Blatch., 374.

§ 2188. The house of representatives has the power to punish a witness who refuses to answer the questions put him by one of its committees, and its order directing his commitment is a complete justification to its speaker for ordering him into the custody of the sergeant-at-arms. *Stewart v. Blaine*,* 7 Ch. Leg. N., 36.

§ 2189. The house of representatives has power to punish contempts, and for this purpose may imprison those whom it adjudges guilty of contempt. *Anderson v. Dunn*, 6 Wheat., 224.

§ 2190. Every court is the sole judge of its own contempts, and in the case of a commitment for contempt, no other court can have the right to inquire *directly* into the correctness or propriety of the commitment. The petitioner was committed for refusing to answer questions put to him at the bar of the senate in regard to the means by which a treaty which was being discussed in the senate in secret session had been obtained and published. *Held*, that this was a case within the jurisdiction of the senate, and that this court had no jurisdiction to inquire into the commitment on *habeas corpus*. *Ex parte Nugent*,* 1 Am. L. J., 107.

§ 2191. **Appeal.**—The supreme court has no power to reverse, on appeal, a fine imposed by the circuit court for a contempt of it. *New Orleans v. Steamship Co.*, 20 Wall., 387.

§ 2192. **Power of commissioner.**—*Quære*, whether a commissioner of a United States court has power summarily to commit a citizen for contempt of court. *Ex parte Doll*,* 7 Phil., 596.

§ 2193. **Arrest outside of district for contempt.**—When one who has been guilty of a contempt of court is arrested by the deputy marshal outside the district in which the warrant of arrest is valid, such arrest is wrongful and any subsequent detention is also wrongful. *In re Allen*, 13 Blatch., 275.

§ 2194. **Release from imprisonment of person in contempt.**—When a prisoner confined for violation of an injunction is unable to secure bail, and the circumstances show that further imprisonment will not result in any advantage to the complainant, the prisoner may be released on his own recognizance. *Goodyear v. Mullee*, 5 Blatch., 467.

§ 2195. **Nature of proceedings for attachment.**—In proceedings for an attachment for contempt of court, all proceedings are civil until the attachment issues; then they are criminal. *United States v. Wayne*, Wall. C. C., 137.

§ 2196. **Requisites of motion for attachment.**—It is incumbent on a plaintiff, in moving for an attachment against a defendant for contempt of court in not obeying its process of injunction, to state specifically in the proofs on which the motion is founded the acts of omission or commission on the part of the defendant which constitute the alleged contempt. *Parkhurst v. Kinsman*, 2 Blatch., 77.

§ 2197. **Evidence must be plain and strong.**—Courts of equity will never grant an attachment for contempt unless the evidence of the violation is plain and strong. *Birdsell v. Manufacturing Co.*, 1 Hughes, 63.

§ 2198. **Mitigation of fine.**—A party wishing to mitigate a fine to be imposed by the court for a contempt should show his inability to pay in such a manner as to put it beyond question. So held where the respondent made an affidavit that his property was less than \$500 in value, although five days previously he had executed a bond to dissolve an attachment in the same suit, swearing that he was worth more than \$5,000. *Doubleday v. Sherman*,* 8 Blatch., 45.

§ 2199. **When person in contempt may be heard.**—A defendant who is in contempt for disobedience to the authority of the court cannot be heard on any motion or proceed in any manner until he shall have purged himself of contempt. *Wartman v. Wartman*,* Taney, 362.

§ 2200. **Attachment in vacation.**—A court of equity can issue attachments for contempt in vacation. *Vose v. Reed*, 1 Woods, 652.

§ 2201. **Order to show cause — Service of rule.**— Where a federal judge has the power to issue an attachment for contempt of court, he may always, in his discretion, make an order previously to the delinquent to show cause why the attachment should not be granted. *In re Chadwick*, 1 Low., 440. A rule to show cause against an attachment for contempt is not sufficiently served by leaving the notice at the residence of respondent, even after diligent search. It must be served personally, or shown to have come to his knowledge; though if it appear that he is evading service, the court may order otherwise. *Hollingsworth v. Duane*,* Wall. C. C., 141.

§ 2202. **The practice in the circuit court for Ohio** in a case of contempt for breach of an injunction is not to apply for a rule to show cause why a defendant should not be committed, but a motion is made that the defendant be committed, and proper notice is served on him. *Worcester v. Truman*, 1 McL., 483.

§ 2203. **In the equity practice of the federal courts**, the English practice does not hold, requiring an order of court fixing a definite time within which a decree of court must be obeyed, before a party can be adjudged guilty of contempt for not obeying it. *Souter v. La Crosse Railroad*, 1 Woolw., 83.

§ 2204. **The practice of the circuit court of the United States**, to issue process of attachment for contempt against a witness upon the proof of the summons and officer's return and non-attendance of the witness, is proper. *Voss v. Luke*, 1 Cr. C. C., 334.

§ 2205. **Stay of proceedings to enforce fine until cause comes before supreme court.**— Where the court had fined a defendant for contempt, ordering the fine paid to plaintiff, and was proceeding to enforce payment by an order of commitment, defendant requested a stay until the question should come before the supreme court as a part of the whole case. On his giving security for the amount of the fine, this was granted. *Fischer v. Hayes*,* 19 Blatch., 184.

§ 2206. **By witnesses.**— The circuit court of the United States has the power, incidental to all courts of law, to punish a contempt by process of attachment; and the neglect or refusal of a witness duly summoned to attend a civil case in that court is a contempt, and will be punished by attachment. *Voss v. Luke*, 1 Cr. C. C., 332.

§ 2207. One summoned as a witness refused to swear, on account of conscientious scruples, but offered to affirm. He was not a Quaker. The court held that by the law and practice of Massachusetts, the affirmation was limited to Quakers only, and he was committed for contempt. *United States v. Coolidge*, 2 Gall., 364.

§ 2208. The circuit court of the United States has power to compel, by process of attachment, the attendance of witnesses in a civil cause who live within one hundred miles of the place of trial, although out of the district of the court. *Voss v. Luke*, 1 Cr. C. C., 337.

§ 2209. The federal court of one district may subpoena a witness in another district, resident within one hundred miles of the place of trial, but it is discretionary with the court to issue an attachment for contempt if such witness does not attend. *Ex parte Beebee*, 2 Wall. Jr., 128.

§ 2210. To sue out an attachment against a witness who is not in default for not appearing, the subpoena served on him having stated no hour for his appearance, is a contempt in the attorney applying for it; and may be punished by fine, with suspension until its payment. *Quære*, whether such an order is reviewable by a writ of error. *Butler v. The People*,* 2 Colo. T'y, 295.

§ 2211. An attachment was issued for not attending as a witness. The witness attended before the attachment was served. The marshal called him out of the court room into the corridor adjoining, and there served the attachment. The court ordered the attachment to be entered countermanded, and the return thereon quashed, on payment of the costs of issuing, the witness being relieved from payment of the marshal's costs of service. *United States v. Scholfield*,* 1 Cr. C. C., 130.

§ 2212. Where a witness refused to answer proper questions before the grand jury, and behaved insolently and threatened some of the jurors, he was fined \$5, and required to furnish security for good behavior for one year. *United States v. Caton*,* 1 Cr. C. C., 150.

§ 2213. **Refusal of defendant to answer interrogatories.**— On motion to punish the defendant for contempt, for not answering certain interrogatories as he had been ordered, the court held that the disclosure sought was irrelevant to the issue, not important to the defense, if any, of the defendant, and not material to the cause of action set forth by the plaintiffs, and it therefore ordered that so much of the order requiring the defendant to answer the interrogatories should be vacated. *United States v. Webb*, 8 Ben., 343.

§ 2214. **By attorneys.**— A threat by an attorney to chastise a judge personally for his conduct in holding court, although made out of court, is a good cause for striking the attorney's name from the rolls of the court; but for any contempt of court not occurring in open court,

the court should give notice and allow the attorney an opportunity to be heard. *Bradley v. Fisher*, 13 Wall., 337 (ATTORNEYS, §§ 56-64).

§ 2215. Under the judiciary act of 1789 the court has no authority to disbar an attorney for contempt, its power to punish for contempt being limited by that act to fine or imprisonment. It can only disbar for such cause as unfits the offending party to be a member of the profession, and then only after due citation and hearing. *Ex parte Robinson*, 10 Alb. L. J., 10. See §§ 2147-49.

§ 2216. If a court of the District of Columbia disbars an attorney for misbehavior before another court of the same district, and this is done without notice to him or opportunity for him to make any defense, a *mandamus* will be issued by the supreme court of the United States commanding the court below to reinstate the attorney. *Ex parte Bradley*, 7 Wall., 364 (ATTORNEYS, §§ 21-29).

§ 2217. **Expressing opinion by juror to relieve himself from duty.**—It is a contempt of court for a juror to form and deliver an opinion on the guilt of a prisoner, after being summoned as juror in the case, if it is done with a view to relieving himself from jury duty. *United States v. Devaughan*, 3 Cr. C. C., 84.

§ 2218. **Threatening witnesses in presence of court.**—Where a female prisoner was acquitted and retired to a piazza adjoining the court-room, and there threatened some of the witnesses, *held*, a contempt in the presence of the court. *United States v. Carter*,* 3 Cr. C. C., 423.

§ 2219. **Abusive language in presence of court.**—It is a contempt of court to call a man a liar in presence of the court. *United States v. Emerson*,* 4 Cr. C. C., 188.

§ 2220. **A publication by one of the parties to a suit, reflecting upon the court, the parties, witnesses or counsel, or tending to influence the result of the suit, is a contempt of court.** *Hollingsworth v. Duane*,* Wall. C. C., 77.

§ 2221. **Publication of evidence.**—A court of law may not punish as contempt a publication by a newspaper of the evidence in a trial, yet it may exclude reporters unless they consent not to publish till after the trial is over. *United States v. Holmes*, 1 Wall. Jr., 10.

§ 2222. **Collusive proceeding between the parties to injure third persons.**—Where the appellant purchased the debt demanded by the appellee in his bill, and carried on a pretended controversy by counsel chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decree injurious to the rights and interests of third parties, *held*, that such conduct was punishable as a contempt of court and that the appeal must be dismissed. *Cleveland v. Chamberlain*, 1 Black, 419.

§ 2223. **Service of state process upon person coming within the jurisdiction to attend federal court.**—When a party litigant comes within the jurisdiction of a state court in order to attend the proceedings in a federal court, and while he is thus within the jurisdiction process from the state court is served upon him, this is a contempt of court in the person who sues out such process from the state court and causes it to be served. *Bridges v. Sheldon*, 18 Blatch., 517.

§ 2224. **Suing receiver in another court without leave.**—It is a contempt of court for one to bring an action against a receiver in a court other than the one which appointed him, and without the leave of the court which appointed him. *Thompson v. Scott*, 4 Dill., 509.

§ 2225. **Interference with operation of road in hands of receiver.**—When a railroad is placed in the hands of a receiver, pending a suit for its foreclosure, the receiver becomes an officer of the court, and the property is considered as property belonging to the court, and will be protected by all the means at its disposal. Hence, when strikers interfered with the running of trains on a road in the hands of a receiver, the court held them guilty of a contempt, and imprisoned them for it. But as the proceedings were summary, without right of trial by jury, the court only punished such of them as were proved guilty beyond doubt. *King v. Railway Cos.*,* 9 Ch. Leg. N., 401; 7 Biss., 529.

§ 2226. **Property held in trust by the court for its protection, while a proceeding by foreclosure is going on for the purpose of enabling those who have a right to the property to obtain it by purchase by decree of the court, is, while thus in possession of the court, like public property, and the court can allow no interference with it whatever, from any foreign source, but will treat and punish such interference as a contempt.** So held where strikers, who had prevented the running of trains on a railroad in the hands of a receiver appointed by the court, were attached for a contempt. *Secor v. Tol., P. & W. R'y Co.*, 9 Ch. Leg. N., 393. See §§ 2173-75.

§ 2227. **Interference with vessel released from custody of court on bond.**—When a vessel is seized on process in admiralty and then released on bond, the vessel is not thereafter in the custody of the court, the bond being substituted in its place; and one who seizes the vessel forcibly from the possession of the person to whom she has been delivered on bond is not guilty of a contempt of court. *United States v. Towns*, 7 Ben., 446.

§ 2228. **Sale by defendant of real estate attached in a patent suit.**—It is not a contempt of court for the defendant in a patent suit, whose real estate has been attached by filing a writ in the town clerk's office in accordance with the state laws, to sell that real estate. It is not in possession of the court or its officers, as personal property which has been actually taken into custody is. *Steam Stone Cutter Co. v. Windsor Manuf. Co.*, 18 Blatch., 291.

§ 2229. **After an action of replevin is discontinued**, the defendant is not guilty of contempt in taking possession of the goods, as they are no longer in the custody of the law. *Mitchell v. Wilson*, 3 Cr. C. C., 92.

§ 2230. **Interference with officers of court.**—It seems that if the officers of a federal court are obstructed or interfered with in the just exercise of their duties, the court may interpose and punish such unwarranted interference as a contempt. *Crane v. McCoy*, 1 Bond, 422, 428.

§ 2231. **Working of mine by plaintiff who has enjoined his co-owner from working it.** Where a plaintiff, owning half a silver mine, applied for an injunction against his co-owner, and the court enjoined the co-owner from working the mine, but the plaintiff himself afterwards worked the mine, this was held to be a gross abuse of the process of the court, which the court had the power to punish and might punish by dissolving the injunction. *Van Zandt v. Argentine Mining Co.*, 2 McC., 643.

§ 2232. **Parting with a trust fund while the question of its disposition is pending before the court** is a contempt of court, and it is wholly irrelevant to set up in defense that the claimant of the fund had not a valid title, as this is the very question to be settled on final hearing. *Wartman v. Wartman*,* Taney, 362.

§ 2233. **Attempt to remove petitioner for freedom beyond the jurisdiction.**—On a petition for freedom, it is a contempt of court for the defendant to attempt to remove the negro beyond the jurisdiction of the court; and if an injunction has been granted, the court will make the defendant give security against breach of the injunction. *Thornton v. Davis*, 4 Cr. C. C., 500.

§ 2234. If a master, after notice of the petition, attempts to remove a slave, who has petitioned for freedom, out of the jurisdiction of the court in which the petition is filed, he will be attached for contempt of court. *Richard v. Van Meter*, 3 Cr. C. C., 214.

§ 2235. **Violations of orders and injunctions in bankruptcy.**—When a mortgagee violates an order of the district court of the United States in bankruptcy, by foreclosing the mortgage, the assignee in bankruptcy may have an attachment for contempt. *In re Feeny*,* 4 N. B. R., 233. See DEBTOR AND CREDITOR.

§ 2236. Where a bankrupt receives money after service of the usual injunction, and turns it over to his assignee after having spent some of it, he is not guilty of such a wilful contempt as to deserve either personal or pecuniary punishment. *In re Hayden*,* 7 N. B. R., 192.

§ 2237. Where the district court in bankruptcy enjoins a sheriff of a state court and a judgment creditor from levying an execution on property of the bankrupt, and the judgment creditor procures an execution to be levied in defiance of the injunction, he will be fined by the district court for contempt. *In re Tift*, 11 Fed. R., 463.

§ 2238. When a debtor is adjudged bankrupt in the district court of the United States, and an injunction is served on a creditor who has attached the debtor's property in a suit in a state court, to restrain the creditor from further proceedings in that case, it is contempt of court for the creditor to permit his attorneys to assign the claim after the injunction is served on him and get judgment and sell the attached property. The creditor must see that the case is stopped. *United States v. Bancroft*, 6 Ben., 395.

§ 2239. Prior to the filing of a petition in involuntary bankruptcy, proceedings to foreclose a mortgage given by the bankrupt had been begun in a state court. After the filing of the petition, but before the adjudication, a decree of foreclosure and sale was made in the state court. Before the assignment to the assignee, but after the adjudication of bankruptcy, a sale was made, and a decree entered in the state court for the deficiency. *Held*, there being no injunction against the sale or against entering a decree for the deficiency, that this was no contempt on the part of the mortgagee. *In re Irving*, 8 Ben., 463.

§ 2240. Where a register in bankruptcy makes an order, and the party to whom it is addressed neglects to comply with it, he is guilty of contempt of court and may be punished therefor by the district judge. *In re Allen*, 13 Blatch., 274.

§ 2241. When a railroad company has gone into bankruptcy in the district court of the United States, and an injunction has been granted and served on an attorney to restrain him from prosecuting an action for the appointment of a receiver of the road in a state court, it is a contempt for him to continue his application for such receiver. *In re South Side R. Co.*, 7 Ben., 394.

§ 2242. **Ambiguous injunction order.**—Proceedings in contempt will not lie for violation of an injunction order where the order was ambiguous, and the act in question was not nec-

essarily a violation. So held where the injunction was against making any levy, under a certain execution then in the hands of a marshal, the only persons enjoined being those "in charge of said writ of execution." The levy was made on another execution issued a month later, and by a marshal not strictly included in the injunction. *In re Cary*,* 10 Fed. R., 622.

§ 2243. Where the plaintiff tried to entrap the defendants into violating an injunction against selling patented goods, and then immediately moved for an attachment, knowing the defendants to be innocent of any wrongful act, there having been in fact no violation of the injunction, *held*, that costs must be taxed against the plaintiff. *Sparkman v. Higgins*, 2 Blatch., 29.

§ 2244. Service of the injunction.—When there is any doubt whether the writ of injunction was served on the defendant or not, the court will not grant a motion for attachment for breach of the injunction. And it seems that a failure to insert in the writ a concise description of the particular acts or things in respect to which the party is enjoined would also be an answer to such a motion. *Whipple v. Hutchinson*, 4 Blatch., 190. As to Injunctions, see EQUITY.

§ 2245. The rule requiring personal service of an injunction order as the basis of proceedings for contempt will be relaxed only when necessary to secure the ends of justice; as where the party knew of the order and violated it before he could be served. Those who procure an *ex parte* injunction and make no effort to have it served on the parties enjoined, though it would be easy so to do, are not entitled to proceed in contempt upon any doubtful and disputed notice alleged to have been conveyed indirectly. *In re Cary*,* 10 Fed. R., 622.

§ 2246. Act done pending action but before injunction issued.—Pending an action for injunction to restrain the defendant from making or selling certain patented articles, but before the injunction was issued, the defendant sold his stock in trade, which included some of the articles. *Held*, that, there being then no order or decree of the court in force, under the act of 1831, in regard to contempts, the said sale was not a contempt. *United States v. Day*,* 6 Am. L. Reg., 632.

§ 2247. Motion to commit after expiration of injunction.—If an injunction has expired by limitation, a motion to commit for a supposed breach of such injunction, committed after its expiration, will be denied. *Gray v. Chicago, Iowa & Neb. R. Co.*, Woolw., 68.

§ 2248. Breach of injunction granted by state court before removal.—When a case is removed from a state court to a federal circuit court, under the twelfth section of the judiciary act of 1789, if a preliminary injunction has been granted by the state court, the federal court cannot punish for breach of it. A new one should be applied for. *McLeod v. Duncan*, 5 McL., 343.

§ 2249. Agency as a defense.—It is no defense to a motion for attachment for the breach of an injunction, restraining the use of a patent, issued in a suit to which the defendant had been made a party, that he was using the forbidden device as the agent and under the control of others, or that he was the chief engineer of the steamboat on whose engine the device was used. *Sickels v. Borden*, 4 Blatch., 14.

§ 2250. Requisites to liability in patent case.—It seems that, in order to render a person liable to attachment for breach of an injunction restraining the use of a patent, he should have been a party to the suit in which the injunction was granted and have had notice of the application for it. *Ibid.*

§ 2251. Evidence as to the originality of invention.—On a motion for attachment for breach of an injunction, evidence that the plaintiff was not the first and original inventor of the thing patented will not be received. *Whipple v. Hutchinson*, 4 Blatch., 190.

§ 2252. Corporation.—The United States courts may, under the statutes of the United States, punish a corporation for a contempt of court in disobeying an injunction of the court, by a fine laid upon the corporation itself, doing business in the jurisdiction of the court, as well as upon the subordinate agents of the corporation who directed the breach of the injunction. *United States v. Memphis & Little Rock R. Co.*, 6 Fed. R., 238.

§ 2253. Where the object of the motion for attachment is merely to ascertain the rights of the plaintiff.—When the object of a motion for attachment for contempt of court by reason of the alleged violation of an injunction was not to mulct the defendant in damages, but to ascertain the extent to which the plaintiff was to be protected in the enjoyment of his patent, the court refused to impose more than a nominal fine of \$50, although of opinion that there had been a studied attempt on the part of the defendant to obtain the benefit of the plaintiff's patent. *Schillinger v. Gunther*, 14 Blatch., 152.

§ 2254. Acts of trustees within the discretion allowed them.—When trustees are enjoined by order of court from disposing of the trust property except in a specified manner, but this manner involves a large exercise of discretion by the trustees, if it can be shown that they acted in good faith, and that their acts might fairly come within the discretion granted them,

their proceedings do not amount to a contempt of court. *Vose v. Trustees of Internal Improvement Fund*, 2 Woods, 651.

§ 2255. Failure of surety on admiralty bond to pay judgment.—The admiralty court cannot punish as a contempt the failure of a surety on an admiralty bond to pay a money judgment. *The Blanche Page*, 16 Blatch., 7.

§ 2256. Failure to pay fees.—A clerk of the federal circuit court in the District of Columbia may have an attachment for contempt against one who fails to pay his fees. *Lee v. Patterson*, 2 Cr. C. C., 199.

§ 2257. Disobedience of order which is a final judgment for payment of money.—A federal court has no power to punish by imprisonment for contempt of an order which it has made, and which is in effect a final judgment for the payment of money, whether the proceeding in which it is made is of legal or equitable cognizance. *In re Atlantic Mutual Life Ins. Co.*, 9 Ben., 338.

§ 2258. Disobedience of writ of habeas corpus.—An order from the war department is not a sufficient warrant to the United States marshal to justify him in disobeying a writ of *habeas corpus* issued by the circuit court of the United States. The privilege of the writ may be suspended by the president of the United States, but until it is, the disobedience of the officer is a contempt of court, and will be punished by fine. *Ex parte Field*, 5 Blatch., 83.

§ 2259. When on the return of a *habeas corpus* issued by the judge of a state court, it appears that the prisoner is held as a soldier of the United States, the state court loses all jurisdiction of the case, and if it afterwards imprisons the commanding officer for contempt in not producing the soldier before it, a writ of *habeas corpus* will issue from the United States circuit court to have such officer brought before it, and he will then be discharged. *In re Neill*, 8 Blatch., 157.

§ 2260. Where one was the chief actor in a forcible taking of slaves from their master against his and their wishes, and the master sued out a writ of *habeas corpus* against him for the slaves, to which he returned that he had not and never had custody of the slaves, it was held that this return was evasive, if not false, and that he should be committed for contempt of court. *United States v. Williamson*,* 3 Am. L. Reg. (O. S.), 736.

§ 2261. Disobedience of mandamus by defendant who has taken a writ of error.—If a circuit court of the United States has awarded a peremptory *mandamus*, and the defendant takes a writ of error which is decided against him, he is not guilty of contempt of court for not obeying the first *mandamus*, but an *alias mandamus* will issue against him. *United States v. Kendall*, 5 Cr. C. C., 385.

§ 2262. Disobedience of mandamus to collect taxes — Justification under state authority.—When a *mandamus* has been issued by the United States circuit court, to the officers of a county, to compel them to collect a tax and satisfy judgments recovered in that court against the county on coupon railroad bonds issued by the county to assist the railroad company, if such *mandamus* is disobeyed because the state court has reversed its former decisions and now decides the bonds issued without authority, and enjoins the collection of such a tax, an attachment for contempt will issue from the federal court. *United States v. Supervisors of Lee Co.*, 2 Biss., 78.

§ 2263. Resignation by officer to avoid obedience to mandamus.—Where an officer has an unrestricted right of resignation, such resignation is not contempt of court, although given to avoid obedience to a writ of *mandamus*. *United States v. Justices of Lauderdale County*, 10 Fed. R., 461.

§ 2264. Power to carry into effect section 9 of act of 1866.—This court has power, under the acts of 1789 and 1831, empowering it to punish for contempt, to carry into effect section 9 of the act of 1866 (14 Stat. at L., 102), authorizing the supervisors of internal revenue to apply to it for an attachment against parties refusing to obey a summons issued under section 49 of the act of 1868 (15 Stat. at L., 144). *In re Meador*, 1 Abb., 317.

§ 2265. Compelling clerk to pay to marshal money wrongfully withheld.—A court of the United States has jurisdiction by act of congress, March 2, 1831 (4 Stat. at L., 487), to proceed by summary process for contempt against its clerk to compel him to pay over to the marshal money due to him and wrongfully withheld by the clerk. Such process is in the nature of a criminal proceeding. *In re Pitman*, 1 Curt., 189.

§ 2266. Compelling deputy marshal to pay over money — Resignation.—A deputy United States marshal is an officer of the federal courts and subject to their power as such, and may be compelled, by attachment for contempt, to pay over money collected by him *virtute officii*. If he resigns subsequently to the collection of the money, and neglects to pay it over, he is still subject to the same summary process. *The Bark Laurens*, Abb. Adm., 511.

XI. JUDICIAL AND POLITICAL QUESTIONS.

[See §§ 50-52, *supra*.]

§ 2267. **Power of court as to political questions.**—The power of the federal courts extends only to rights of persons and property, not to any interference with political questions. *State of Georgia v. Stanton*, 6 Wall., 75.

§ 2268. — **claims to territory or sovereignty.**—A circuit court of the United States cannot in its judicial character entertain political questions of a diplomatic nature, or settle claims or rights as to territory and sovereignty, but is bound, so far as its own functions are concerned, to act upon the ground that the claims of the United States are correct. *Williams v. Suffolk Ins. Co.*, 3 Sumn., 275.

§ 2269. — **treason.**—Courts have no policy and can exercise no political powers. They can only declare the law. Nor can they declare judicially that levying war against the United States ceases to be treason when so extensive as to become formidable. *Shortridge v. Macon*, Chase's Dec., 140.

§ 2270. **National boundaries.**—On questions of disputed boundary between two nations each court is bound to follow the contention of its government. The decision of national boundaries is a political, not a judicial, question. *Garcia v. Lee*, 12 Pet., 516. See §§ 746-56.

§ 2271. Although when individual rights depend on national boundaries, the settlement of such boundaries is a matter for the political department of government, not the judicial, and the courts will accept the boundary claimed by the government of their country, yet if the government expressly leaves the decision of such questions to the courts, they are competent, with such authority, to decide the question. *United States v. Arredondo*, 6 Pet., 711.

§ 2272. The United States claimed that by the treaties of St. Ildefonso in 1800, and of Paris in 1803, the territory between the Iberville and Perdido rivers was ceded to them by Spain. Spain denied this. In a suit for the recovery of land lying in that territory claimed by the plaintiff under a grant from the king of Spain subsequent to those treaties, the circuit court of the United States dismissed the suit. On its being brought before the supreme court on writ of error, it was held that in a controversy between two nations concerning a national boundary, the courts of each nation are bound to follow the claim of its own government; that after the acts of sovereign power over the territory in dispute, which have been exercised by the government of the United States under its claim, to maintain any other claim would not be possible for the courts of the United States, and the judgment of the court below dismissing the suit was affirmed. *Foster v. Neilson*, 2 Pet., 299.

§ 2273. When a dispute exists between the government of the United States and a foreign state as to territorial limits, the courts of the United States are bound by the claims of their government, and cannot decide the dispute between the governments. *Williams v. Suffolk Ins. Co.*, 3 Sumn., 273.

§ 2274. If the executive of the United States decides against a claim of a foreign nation to exercise sovereignty over territory outside the United States, the courts of the United States are bound to follow this decision. *Williams v. Suffolk Ins. Co.*, 13 Pet., 419.

§ 2275. **Recognition of new sovereignty.**—It belongs to the executive department of the government to decide whether a new sovereignty shall be recognized by it or not, and the courts are bound by its decision. *Williams v. Suffolk Ins. Co.*, 1 Law Rep., 153.

§ 2276. The defense being that the prisoners were authorized to act as privateers by the Confederate States, it was held that this court could not recognize the Confederate States as an independent government until it had been so recognized by the legislative and executive departments. *United States v. Baker*, 5 Blatch., 6.

§ 2277. This court has no authority to recognize a body of revolutionists as a government, unless they have been so recognized by congress or the executive. *The Hornet*, 2 Abb., 35.

§ 2278. It is for the executive, not the judiciary, to recognize the existence of a revolted colony as a sovereign state. *Kennett v. Chambers*, 14 How., 51; *Clark v. United States*, 3 Wash., 102; *Rose v. Himely*, 4 Cr., 271. And the courts of the United States must consider the ancient *status* as continuing until some recognition of the change is made by the government. *Rose v. Himely*, 4 Cr., 271.

§ 2279. **The fact of peace or war.**—The courts cannot decide whether their government is at peace or at war with another country. The government decides this, and the courts are bound by the decision. *United States v. 129 Packages*,* 2 Am. L. Reg. (N. S.), 429; *United States v. 100 Barrels of Cement*,* 3 Am. L. Reg. (N. S.), 735.

§ 2280. **The conditions of war or peace** are of purely political determination, not of judicial. *United States v. 1,500 Bales of Cotton*,* 15 Int. Rev. Rec., 137.

§ 2281. As to the date of the commencement or termination of a war, the courts are guided by the decision of the political department of the government — as, *e. g.*, when the Rebellion ended. *Phillips v. Hatch*, 1 Dill., 573.

§ 2282. The proclamations of intended blockade by the president, viz., that dated April 19, 1861, embracing the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas; and that dated April 27, 1861, embracing the states of Virginia and North Carolina, and the proclamations declaring the war closed, viz., that dated April 2, 1866, embracing the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana and Arkansas, and that dated August 20, 1866, embracing Texas, fix the dates of the commencement and close of the war in the states mentioned in them. *The Protector*, 12 Wall., 700.

§ 2283. Recognition of civil war between foreign country and its colonies.— The government of the United States having recognized the existence of a civil war between a foreign country and its colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes. *The Divina Pastora*, 4 Wheat., 52.

§ 2284. Completion of conquest of California.— The political department of the government of the United States has fixed July 7, 1846, as the date upon which the conquest of California was completed, and the judiciary follows the political department in this respect. *Hornsby v. United States*, 10 Wall., 239.

§ 2285. Whether territory is in insurrection.— Whether a certain portion of the territory of the United States is in insurrection or not is a question which the courts can only decide as they are informed by the executive; and where a state was proclaimed to be in insurrection, except where certain conditions existed, it was held that the court could not determine, by evidence *in pais*, whether any particular portion was in such a *status* or not. *United States v. 129 Packages*,* 11 Am. L. Reg., 419.

§ 2286. Confiscation of enemies' property.— The property of a nation at war with another cannot be confiscated by the courts without a law passed by the legislature. This is not a subject for judicial determination. *United States v. The Schooner Juanita*, Newb., 358.

§ 2287. The question, what shall be done with property of an enemy found in the country of one of the belligerents at the beginning of a war, is one of policy, not of law. The government has a right to confiscate it, but unless it has done so by act, the courts have no power to declare it confiscated. *Brown v. United States*, 8 Cr., 128.

§ 2288. Seizure of enemies' property.— This court has no jurisdiction of an action of trover for cotton bought by the defendant of United States officers, who had seized it in Arkansas during the war, as the property of a rebel general at the time in actual service, although the legal title was then in the plaintiff, who was then in no wise engaged in the rebellion. This on the general principle that municipal courts cannot inquire into the propriety of seizures made by an officer, of property as the property of an enemy. *Coolidge v. Guthrie*, 8 Am. L. Reg. (N. S.), 22; 1 Flip., 97.

§ 2289. Treaties.— A court has no power to alter, amend or add to a treaty, or supply a *casus omissus* in it. *The Amiable Isabella*, 6 Wheat., 71.

§ 2290. The federal courts have no power to go behind the treaties made by the executive with foreign powers, to see whether the treaties were correctly made and whether the foreign power which purports to have signed the treaty had in fact authority so to do. The treaty is part of the supreme law of the land and will so be administered by the courts. *Doe v. Braden*, 16 How., 657.

§ 2291. When a treaty has become voidable by reason of one of the parties having infringed its provisions, it is still to be regarded by the courts as the law of the land until the executive authority shall declare it void. *Jones v. Walker*, 2 Paine, 696.

§ 2292. Public land.— The decisions of the land department of the federal government are final as to questions within its jurisdiction. Courts will not interfere with its proceedings by *mandamus* or injunction as long as the title remains in the United States and the matter is before the department for decision; but when the patent has issued and the title is in the individual, and the question is one of private right, the proper courts of the United States may inquire whether, according to the laws of congress relating to public lands, or by the established rules of equity, the party owning the land holds it in trust or absolutely. *Johnson v. Towsley*, 13 Wall., 87.

§ 2293. When the United States has released all its interest in public lands, the executive department cannot give relief to one claiming the land. Application must be made to the judiciary. *In re Vifvarenne*,* 4 Op. Att'y Gen'l, 510.

§ 2294. The validity of the grants in the act of 1824, relating to the Arredondo grants, as well as their extent and boundaries, are by that act intended to be submitted to the federal courts as judicial questions. *Rights of Claimants, etc.*,* 5 Op. Att'y Gen'l, 110.

§ 2295. Confirmation of titles in Orleans Territory under act of March 3, 1807.— Courts of justice have no power to revise what congress, or commissioners acting by its authority, have done in confirmation of the titles of individuals to tracts of land in the Orleans Territory under the act of March 3, 1807. *Lafayette v. Kenton*, 18 How., 197.

§ 2296. Land claims under former government where new territory is acquired.— When territory is acquired by the United States, by cession from some other state, the federal courts have no jurisdiction to decide upon conflicting claims as to land in this territory, if such claims existed under the former government of the territory and are imperfect in law. This decision belongs to the legislative department. *Maguire v. Tyler*, 8 Wall., 661.

§ 2297. Whether a state is duly organized and capable of enacting a statute.— A statute of the state of Michigan incorporated a young men's society, under deed from which the plaintiff in a suit in a state court of Michigan claimed land. It was objected that the legislature of Michigan was not authorized to enact statutes at that time, because the territorial government of Michigan, under a statute of congress, was still in force. The decision of the state court was for the validity of the state statute. Under the twenty-first section of the judiciary act, a writ of error issued to bring the case from the supreme court of Michigan to the supreme court of the United States, on the ground that the decision was against the validity of a United States statute. It was held by the supreme court that the question whether a state is duly organized and a political member of the United States, and capable of enacting statutes, is a political question, not a judicial one, and that the only inquiry possible in the federal court in regard to a state statute is whether its subject-matter is repugnant to a United States statute. *Scott v. Jones*, 5 How., 375 (APPEALS, §§ 1169-74).

§ 2298. Whether a state constitution has been adopted by coercion of congress.— Where congress authorized a state to frame a new constitution, and she elected to proceed within the scope of the authority conferred, and the result was submitted to congress as a voluntary and valid offering, and was so received and recognized by that body, it cannot be set up that the constitution was adopted by the coercion of congress; as the case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *White v. Hart*, 13 Wall., 646.

§ 2299. Right of state to legislate over a people claiming to be independent.— A bill brought to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the state denies, is not a proper subject for judicial action. It belongs to the legislative department of government. *Cherokee Nation v. State of Georgia*, 5 Pet., 20.

§ 2300. Construing a statute belongs to the courts, not to congress. Therefore when congress gives a construction to a statute it can only operate *in futuro*. *Home Ins. Co. v. Stockdale*,* 16 Int. Rev. Rec., 30.

§ 2301. Whether a statute has been repealed.— When a claim in a suit is supported by the enactment of a statute which the party asserting the claim alleges to have repealed a prior statute, the question whether it has so repealed it is a judicial one, for the court. *United States v. Claflin*, 7 Otto, 549.

§ 2302. Whether a law appearing in the printed statutes is valid and properly passed.— The question whether a law which is printed in the authorized volume of statutes of a state, and is *prima facie* a law — is in reality a valid law, and properly passed by the legislature of the state — is a judicial question proper for courts, and there can be no estoppel upon a party to prevent his attacking the validity of such a law. *Town of South Ottawa v. Perkins*, 4 Otto, 267 (BONDS, §§ 1353-60).

§ 2303. The principles of retaliation or reciprocity are principles of policy, not rules of judicial action. *The Nereide*, 9 Cr., 422.

§ 2304. Whether tolls are reasonable.— Although it may be a judicial function to determine what are reasonable tolls on a bridge, yet when that question must be resolved by determining what return the corporation building the bridge shall receive on its investment, and there is no precedent or usage, the power approaches so nearly an arbitrary discretion as to lie upon the very confines of judicial power. *Canada Southern R'y Co. v. International Bridge Co.*, 8 Fed. R., 194 (CORP., §§ 1292-95).

§ 2305. Whether a search or seizure is reasonable.— The question whether a seizure of property or a search for property is reasonable or not is a judicial, not a legislative, question. *Mason v. Rollins*, 2 Biss., 102.

§ 2306. Public rights susceptible of judicial cognizance.— While congress cannot withdraw from the judicial cognizance any matter which from its nature is the subject of a suit at law or equity or admiralty, nor bring before the courts a matter not subject to judicial determination, yet some public rights, susceptible of judicial cognizance, may or may not be given by congress to the courts to decide; *e. g.*, equitable claims to land by the inhabitants of ceded

territories. *Murray v. Hoboken Land and Improvement Co.*, 18 How., 284 (CONTRACTS, §§ 676-89).

§ 2307. **Whether proclamation of pardon extends to foreigners.**— Whether the president's proclamation of pardon to those who engaged in the war of the rebellion ought not in equity to be extended to foreigners who have given aid and comfort to the enemies of the United States is a question for the legislative, not the judicial, department of the government. *Young v. United States*, 7 Otto, 68.

§ 2308. **Import duty contrary to treaty.**— When congress levies a duty upon imports, which an existing commercial treaty declares shall not be levied, a federal court adopts the act of congress for its rule of decision. *Taylor v. Morton*, 2 Curt., 454.

§ 2309. **Confinement of alien enemies.**— The president of the United States has authority to issue orders for the confinement of alien enemies, and the marshal may execute these orders without the interposition of any court of law. *Lockington v. Smith*, Pet. C. C., 467.

§ 2310. **Deciding between interests of navigation and transportation.**— The power of deciding between the interests of river navigation and of transportation across navigable rivers is a legislative and not a judicial power. *Silliman v. Hudson River Bridge Co.*, 4 Blatch., 412.

§ 2311. **Prize in neutral territory.**— When one of two belligerents makes a prize of a vessel of the other in neutral territory, the proper department to inquire into this offense is the executive, not the judiciary. *Moxon v. The Fanny*, 2 Pet. Adm., 327.

§ 2312. **Warrant against property of collector to recover revenue.**— The summary proceedings under act of congress, May 15, 1820, to recover revenue from a collector in default by warrant against his property, is not an exercise of the judicial power of the United States, and therefore does not belong exclusively to the courts of the United States, but the warrant may be issued by the treasury department. *Murray v. Hoboken Land and Improvement Co.*, 18 How., 275 (CONTRACTS, §§ 676-89).

§ 2313. The issue of a treasury warrant against the estate of a defaulting United States official is commented on, and the question of its lawfulness certified to the supreme court by the circuit court, in *United States v. Taylor*, 3 McL., 541.

§ 2314. **Where officer has been wrongly credited with a certain sum.**— If an officer of the United States has been credited with a certain sum the account cannot be opened by the next head of the department, and the credit charged against such officer; if wrongly credited, recourse must be had to the courts. *Chase v. United States*, *Dev., 80.

§ 2315. **Case against the United States not within the jurisdiction of the court of claims.**— When a case against the United States is of such a nature that it does not come within the jurisdiction of the court of claims, it is not for the judicial department of the government to determine whether the case has an equitable foundation. The application should be made to congress. *Grant v. United States*, 7 Wall., 331.

§ 2316. **Surrender of soldier to the civil authorities of a state.**— While the military is subordinate to the civil arm of our government, yet, when the surrender of a soldier to the civil authorities of a state is demanded, by a private individual, of the president of the United States, the president is not bound by law to deliver him, but will do so on a proper application by the governor of the state, after the manner of an application for the surrender of fugitives from justice. *In re Military Officers*, *2 Op. Att'y Gen'l, 10.

§ 2317. **Promise of government not to prosecute— Communications between the court and the executive.**— On a motion for stay of judgment on the ground that the government had promised not to prosecute, the district attorney having informed the court previously that he had been directed to proceed, the court held that it could have no communications with the executive department except through the district attorney, and that it was solely for the executive department to redeem its pledges. *United States v. Blaisdell*, 3 Ben., 132. See CRIMES, §§ 3028, 3053.

§ 2318. **The jurisdiction in cases of treason given by act of the legislature in Maryland**, 18th April, 1778, to the courts of common pleas of New Jersey, which are courts of general jurisdiction, is general, and this makes it unnecessary that a judgment should show jurisdiction on the face of the record. *Kemp v. Kennedy*, Pet. C. C., 36.

§ 2319. **Executive acts under due authority of law cannot be reviewed or drawn in question by the judiciary**, but if an executive officer, by an unauthorized act, injures an individual, there is an action at law. *Astrom v. Hammond*, 3 McL., 110.

§ 2320. — **departmental construction.**— Acts of the executive department of government are not subject to review by the judiciary. When the treasury department has for many years given a construction to the laws under which it acts, it is questionable whether the judicial power can or should interfere. *United States v. Lytle*, 5 McL., 17.

§ 2321. **President cannot be controlled by the courts.**—A federal court cannot control the president of the United States in the exercise of his executive discretion. *Wilson v. Izard*, 1 Paine, 70.

§ 2322. The president of the United States cannot be restrained by injunction from carrying into effect an act which is alleged to be unconstitutional. *Mississippi v. Johnson*, 4 Wall., 475.

§ 2323. — **money held by government as stakeholder.**—No court can prevent the executive of the United States from the execution of a constitutional law; but where the question is the payment of a fund of money which the government holds as a mere stakeholder, and a case to settle the conflicting claims, much convenience will result if the executive department waits till the court has decided to whom the money belongs. *In re Cathcart*,* 1 Op. Att'y Gen'l, 681.

§ 2324. **Account of marshal for support of slaves taken from condemned slave ship.**—There is no law which obliges the president of the United States to pass an account of a marshal for the support of slaves taken from a condemned slave ship, if he considers the account unjust, although a circuit court of the United States has decided the claim is valid. *In re United States Marshal*,* 1 Op. Att'y Gen'l, 635.

§ 2325. **Interference by one department with a case already in the jurisdiction of another.**—The government of the United States is divided into several departments. When one department has lawfully taken jurisdiction of a particular case, as for instance a claim of prize in a district court, another department will not interfere with the case. *In re Captures on the Rio Grande*,* 11 Op. Att'y Gen'l, 117.

§ 2326. **Bonding of condemned vessel.**—Where a district court of the United States, in admiralty, has bonded a condemned vessel, and allowed her to go, the president cannot interfere with this action. *In re The Meteor*,* 12 Op. Att'y Gen'l, 2.

§ 2327. **Power of judiciary to forbid a public work.**—When a public work has been begun by congress in a certain manner, as under the appropriations for rivers and harbors, and is being carried out, the judiciary has no power to forbid the work. *Wisconsin v. Duluth*, 6 Otto, 387 (CONST., §§ 1213-14).

§ 2328. **The decision of the secretary of the treasury is not a judicial decision.** If his decision is *executive*, it concludes the department. If merely ministerial, it does not. *Beatty v. United States*,* Dev., 240.

§ 2329. **The action of the postmaster-general, in making extra allowance to postmasters under act of congress of June 22, 1854, is not subject to review by a federal court.** *United States v. Davis, Deady*, 296.

§ 2330. **Where congress has settled a claim against the government.**—If congress has acted upon a claim for an allowance against the United States, and the sum designated is paid, no further allowance can be made by the judiciary. *United States v. Williams*, 4 McL., 569.

§ 2331. When congress has acted on a claim against the United States and has made an allowance, a court of justice cannot enlarge that allowance, or revise the action of congress in any way. *Tiernan v. Woodruff*, 5 McL., 134.

XII. LEX FORI AND REMEDIES.

[See CONTRACTS, V, 6.]

§ 2332. **When state laws govern in federal court.**—Although the United States courts apply the rules of law of the state in which they are sitting when the controversy is between citizens of that state, or relates to land situated in that state which is governed by the *lex rei sitæ*, yet there are limitations to this rule, and when the controversy affects citizens of other states, and arises in no way from local regulations, *e. g.*, foreign commercial contracts, the state laws will not be the exclusive guides. Thus, where a debtor, resident in Rhode Island, who had secured a discharge in insolvency in that state, was sued by an inhabitant of Batavia on a bill of exchange payable in Amsterdam, drawn by the defendant's agent in Batavia on a firm in Amsterdam, and there protested for non-acceptance, it was held that the discharge in insolvency did not bar the action. *Van Reimsdyk v. Kane*, 1 Gall., 371.

§ 2333. Although state laws, so far as they are rules of property, will be respected in the federal courts, yet when they are only rules of practice, *e. g.*, when they settle what a judgment is and the legal effect of a judgment, these laws are not local in character and will not be binding upon the federal courts. *Gibson v. Chew*,*16 Pet., 315.

§ 2334. **Commercial and maritime questions.**—The federal courts, sitting as courts of admiralty, and in questions commercial and maritime, are not governed by the laws of particular states, but by the general principles and doctrines of the law merchant. *Mutual Safety Ins. Co. v. Cargo of Brig George, Olc.*, 101.

§ 2335. **Rights created by state laws.**—Although state legislatures cannot prescribe the forms and modes of procedure in courts of the United States, yet when they create rights and prescribe a remedy which is substantially the same as a form of remedy existing in the proceedings of the federal courts, *e. g.*, a bill in equity for the cancellation of a deed, such right may be enforced in the federal courts. *Clark v. Smith*, 13 Pet., 203.

§ 2336. **When federal courts follow state decisions.**—On questions of the construction of state statutes or questions relating to land titles, the federal courts are bound to follow the state decisions, but on questions of commercial law they are not bound by the state decisions. Therefore, where suit was brought in Pennsylvania in the United States circuit court on coupons payable to bearer, and attached to railroad bonds, on appeal to the supreme court the court held them negotiable, although the supreme court of the state had held the opposite. *Mercer County v. Hackett*, 1 Wall., 96 (BONDS, §§ 1409-12).

§ 2337. The question whether or not a certificate of deposit is a negotiable promissory note is not to be decided in the federal court by any decision of state courts. It is a principle of the common or mercantile law and should be decided by the federal court in accordance with that law. *Austen v. Miller*, 5 McL., 157 (BANKS, §§ 261-62).

§ 2338. **Title to land** can be acquired and lost only in the manner prescribed by the law of the place where such land is situated. *United States v. Crosby*, 7 Cr., 115; *Kerr v. Moon*, 9 Wheat., 570.

§ 2339. **Personal property.**—The right to personal property may be regulated by the law of the domicile, but the right of action must be regulated by the law of the court where the action is brought. *Blane v. Drummond*, 1 Marsh., 67.

§ 2340. The title to personal property and all rights relating to it are governed by the domicile of the owner, but the right to sue for it, being dependent upon the forms of action of various states, is governed by the *lex fori*. *Ibid.*

§ 2341. The laws of the state where personal property of a deceased person is situated govern the administration of the estate in that state. *Smith v. Union Bank*, 5 Pet., 527.

§ 2342. **The lien of judgments.**—As the process, both mesne and final, in the district and circuit courts of the United States, is conformed to those of the different states in which they have jurisdiction, the lien of judgments on property within the limits of the jurisdiction depends also upon the state law, where congress has not legislated on the subject. *Williams v. Benedict*, 8 How., 111.

§ 2343. **The proper action upon an instrument having a scrawl for a seal.**—On a question whether an instrument purporting to be a sealed instrument, but having only a scrawl of ink for a seal, should be sued upon as a sealed instrument, or in *assumpsit*, the law of the place where suit is brought will govern. In New York such an instrument is not under seal. *Le Roy v. Beard*, 8 How., 464 (AGENCY, §§ 474-78).

§ 2344. **Rate of interest.**—When interest is given as damages, and not under a contract, the law of the forum will regulate the rate. *Goddard v. Foster*, 17 Wall., 143.

§ 2345. **Limitation.**—The statute of limitations is a part of the law of the remedy, and is governed by the *lex fori*,—the law of the court where the right is sought to be enforced. *M'Elmoyle v. Cohen*, 13 Pet., 327; *Townsend v. Jemison*, 9 How., 413; *McOlung v. Silliman*, 3 Pet., 276.

§ 2346. A. was surety on an administrator's bond in Maryland. Suits on such bonds are barred in twelve years by Maryland statutes. Before that time A. removed to Indiana, where no such limit exists. On suit brought in the circuit court of the United States in the district of Indiana after the twelve years had elapsed, it was held that the suit was barred. *Maryland v. Todd*, 1 Biss., 70.

§ 2347. A statute of limitations of a state is binding upon the federal courts sitting in that state. *Bank of Alabama v. Dalton*, 9 How., 527.

§ 2348. A state statute limiting the time within which execution can issue on a judgment is a statute of limitations and not a mere rule of procedure. It is therefore binding upon the federal courts sitting in that state. *Ross v. Duval*, 13 Pet., 60.

§ 2349. **Lex fori.**—Whatever relates to the remedy and is a part of the procedure in a case is governed by the law of the forum; but whatever affects the substance of an obligation or the rights of parties as growing out of the contract itself is governed by the law of the contract. *Pritchard v. Norton*, 16 Otto, 130 (CONTRACTS, §§ 1181-87).

§ 2350. The nature, validity and construction of a contract are governed by the *lex loci contractus*; the form of action, the course of judicial proceedings, the limitations of time for bringing the action, are governed by the *lex fori*. *Nicolls v. Rodgers*, 2 Paine, 438; *Wilcox v. Hunt*, 13 Pet., 379; *Bank of United States v. Donnally*, 8 Pet., 372.

§ 2351. When suit is brought in the circuit court on a contract made in another state, although the rights of the parties are determined by the law of the foreign state, yet the law of the remedy (and the statute of limitations is part of that law) is regulated by the *lex*

fori,—the law of the state in which the suit is brought. *Le Roy v. Crowninshield*, 2 Mason, 151.

§ 2352. When an action is brought on a promissory note made and payable in one state and judgment is obtained in another, all processes used to enforce the judgment will be governed by the law of the state in which the judgment is obtained, as being part of the remedy only, and as such being governed by the *lex fori*; but the rights of the parties under the contract are settled by the law of the state where it was made. *Mathuson v. Crawford*, 4 McL., 541.

§ 2353. The *lex loci contractus* controls the rights of the parties to a contract, but not the mode of enforcing the remedy, unless it is expressly so stipulated in the contract. *Smith v. Atwood*, 3 McL., 545.

§ 2354. **Constitutionality of law affecting remedies.**—A law affecting remedies is not unconstitutional if it does not affect rights existing before its passage. *Sampeyreac v. United States*, 7 Pet., 222.

§ 2355. **Due process of law.**—The provision of the constitution that no person shall be deprived of property without due process of law will be enforced when cases are brought before the courts involving such principles. *United States v. Lee*, 16 Otto, 218.

§ 2356. **Foreign insolvent law affecting remedy only.**—The insolvent act of New York, as it does not pretend to impair the obligation of the contracts which exist against the debtor, but only to free his person and effects from process of law based on those contracts, is part of the law of remedy, and therefore will not be applied to a suit on those contracts brought in the circuit court of the United States in the state of Massachusetts. *Titus v. Hobart*, 5 Mason, 379.

§ 2357. **Removal of cause from one county to another.**—When a case is removed from one county of the District of Columbia to another, the modes of procedure of the court to which the case is removed will govern, while the cause of action and the defenses will be governed by the law of the county where the cause of action arises. *Alexandria Canal Co. v. Swann*, 5 How., 87 (ARBITRATION, §§ 4-9).

§ 2358. **Freedom gained in Maryland recognized in Alexandria.**—The circuit court of the United States in Alexandria will recognize the right of freedom gained by a slave in the state of Maryland. *Delilah v. Jacobs*, 4 Cr. C. C., 238.

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- New England & Miss. Land Co v. United States,* 1 Ct. Cl., 135. Courts, § 1802.
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- b. Persons in representative capacity; New York administratrix suing on New Jersey statute; contrary authorities. Courts, §§ 583-84.
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- e. Under act of 1839, allowing omission of necessary parties whose presence would defeat the jurisdiction; joint parties. Courts, §§ 843-44, 881, 882, 1221-22.
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- f. under act of March 3, 1875, it is unnecessary, in suit affecting land, that any party be a citizen of the state where suit brought. Courts, §§ 847, 887.
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 congress may transfer, pending suit. Courts, § 180.
 c. Effect of war on jurisdiction. Courts, §§ 139-41.
 d. How lost; by former suit pending, see *post*, 4.
 not by dismissing suit, if resumed at same term; power to revise judgments restores jurisdiction. Courts, §§ 236, 284-87.
 not by death or change of residence pending suit. Courts, §§ 637, 676-77, 970-72, 975.
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 not by change of districts, or by setting defendant's county into another district. Courts, § 1706.
4. CONFLICTING AND CONCURRENT JURISDICTION. See *Judgments.*
 a. Generally; one suit does not bar another, in a different court, unless the controversies are identical. Courts, § 282.
 judicial comity. Courts, §§ 283-84, 315, 447-48.
 the court first obtaining jurisdiction is entitled to retain it. Courts, §§ 284, 302.
 it may dismiss after judgment, and resume jurisdiction, at same term, so as to exclude intervening jurisdiction. Courts, §§ 236, 284-87.

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revisory power; federal courts have none over state judgments, except under United States laws or constitution. Courts, §§ 432-35.

b. Conflicting jurisdiction; course of decision in supreme court. Courts, §§ 255-57, 288.

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court first obtaining constructive possession has jurisdiction. Courts, § 299; but see §§ 300, 303.

no priority when objects of the two suits are different. Courts, § 300.

suit on promissory note not affected by subsequent garnishment of defendant in a state court. Courts, §§ 244, 313.

state courts; cannot assume jurisdiction in replevin for property in possession of marshal under process. Courts, §§ 228, 258-59, 263-65, 362-391.

though such process void. Courts, § 290. See § 380.

nor impede or arrest, by injunction or otherwise, the action of federal court within its jurisdiction. Courts, §§ 229, 261-62.

nor interfere with marshal's possession, but may entertain trover or trespass. Courts, §§ 270-72.

nor attach a federal judgment by process against the plaintiff. Courts, §§ 245, 314.

nor attach money collected by the marshal on execution. Courts, §§ 246, 315.

nor release by *habeas corpus* a prisoner held by order of a federal court. Courts, §§ 253, 332-36, 411, 413.

or a soldier detained by military authority. Courts, §§ 412, 414.

nor enjoin judgment or levy of execution of federal court. Courts, §§ 397, 399, 404.

nor attach a steamer in custody of the marshal in admiralty. Courts, § 385.

nor affect *mandamus* of federal court by injunction. Courts, §§ 406-409.

nor imprison marshal or district attorney for retaining ballot-boxes, etc., when. Courts, § 415.

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nor seize property replevied under state court process. Courts, §§ 231, 266-69.

nor stay proceedings in state court. Courts, §§ 234, 277-79.

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nor take jurisdiction of or attach property in the custody of a state court under process. Courts, §§ 362-391.

nor enjoin or stay legal proceedings of state court, or prevent judicial sale by sheriff. Courts, §§ 394-96. See §§ 400-405.

nor trespass, or probate proceedings, or suit on note. Courts, §§ 401-405.

except where bankruptcy law provides otherwise. Courts, § 403. See §§ 370, 481.

nor annul a will for forgery. Courts, § 436.

nor to set aside a judgment of a state court for irregularity or mistake. Courts, §§ 456, 486-83.

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what amounts to *lis pendens* in state court. Courts, §§ 353-58. See *supra*, 2.

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subsequent garnishment or attachment unavailing. Courts, §§ 343, 345.

JURISDICTION, CONFLICTING AND CONCURRENT — continued.

- concurrent, of state and federal; creditors' bills; injunctions; foreclosure; account against executors and prior administration. Courts, §§ 344, 346-48.
- appointing receivers; probate accounts; trusts. Courts, §§ 349-53.
- bill as to legacies conflicting with pending administration. Courts, § 358.
- bill to enforce maritime lien not barred by former suit in state court. Courts, § 360.
- reversal of probate judgment does not bar suit in federal court. Courts, § 361.
- replevin does not prevent admiralty proceeding *in rem*. Courts, § 392.
- what is an acquiring of jurisdiction, see *supra*, 2.
- res adjudicata* in state or federal court. Courts, §§ 359-61.
- the mere fact of a concurrent state jurisdiction will not authorize federal court to decline jurisdiction. Courts, §§ 418-27.
- so as to concurrent jurisdiction in probate matters, accounts against executors, receivers, insurance companies, railroads, in equity, etc. *Ibid*.
- when one suit does not interfere with the subject-matter of another. Courts, §§ 232, 270-72, 360-61, 369, 392, 428-31.
- when goods of A. are taken on writ against B. Courts, § 430. See § 377.
- suits affecting property in custody, but not its possession. Courts, § 431.
- sale on mortgage while property is in probate administration. Courts, § 491.
- see *post*, 6.
- of courts of law and equity, of fraud. Courts, §§ 132, 443-44.
- that first attaching to property binds it. Courts, § 607.
- federal courts may assume jurisdiction;— of foreclosure of lien, the *status* of which has been determined by a state court, for breach of trust. Courts, §§ 233, 274-76.
- of action involving same subject as former suit in state court, though it cannot stay proceedings in such suit. Courts, §§ 234, 277-79.
- suit to charge property with liens not barred by one to settle priority of the liens. Courts, §§ 235, 280-83.
- to determine rights of the parties to property of insolvent being administered in state court, but not to issue execution. Courts, §§ 240, 304-306.
- but execution may issue for property covered by a specific lien. Courts, § 303.
- of ejectment for property vested in officer by state court. Courts, §§ 242, 307-309.
- of suit against assignees in insolvency, though state court have jurisdiction of the subject-matter. Courts, §§ 311-12.
- in cases of trusts; a state cannot assume exclusive jurisdiction thereof. Courts, §§ 249-50, 322-28.
- to prevent officer from levying or continuing unauthorized attachment. Courts, § 400.
- to enforce laws of the United States, like the fugitive slave law. Courts, § 417.
- state courts may assume jurisdiction of trespass or trover, but not replevin against marshal in custody of goods under process. Courts, §§ 232, 270-72.
- custody of the court; extends to property in possession of marshal or sheriff under process. Courts, §§ 228, 258, 264, 267, 362-391.
- exists where the power of its keeper to prevent withdrawal exists. Courts, §§ 283, 290-91.
- acquired by filing of bill for receiver, service of process, and issuance of restraining order, when; when only by seizure. Courts, §§ 239, 295-303.
- does not necessarily follow from possession of officer. Courts, § 309.
- extends to money collected on *fi. fa.* Courts, § 315.
- continues after delivery by officer to party on forthcoming bond. Courts, §§ 266-69, 363.
- rules in respect to, do not apply to successive suits in federal court. Courts, § 368.
- what is not a conflict between different courts. Courts, § 369.
- custody by state court of vessel engaged in the slave trade gives way to process of federal court. Courts, §§ 370, 381.
- the execution under which a sale is first made gives priority. Courts, § 371.
- if the prior custody ceases, the subsequent custody may be maintained. Courts, § 379.
- will extend the jurisdiction to strangers, irrespective of citizenship, when. Courts, §§ 638-40.
- instances*; replevied property; attached vessel; railroad property attached. Courts, §§ 362-67, 376-78.
- attachment or levy prevents subsequent libel in admiralty. Courts, §§ 373, 376, 381-84.
- waiver by attachment or execution creditor. Courts, § 375.
- and a seizure under the revenue laws, or laws as to the slave trade, is valid. Courts, §§ 370, 381.
- the possession of receivers is protected; subsequent process unavailing. Courts, § 385. See §§ 349-53, 387, 389-91, 393, 398.
- stockholder cannot sue receiver of railroad, nor the railroad. Courts, § 393.
- possession of receiver will not prevent determination of rights in the property by a state court. Courts, § 642.

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- custody of the court; what amounts to; whether seizure of A.'s property on process against B., is. Courts, §§ 377, 430.
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 but a fraudulent or collusive custody, or one held invalid by the state courts, is no protection against subsequent process *in rem*, in admiralty. Courts, § 380.
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5. AFFECTED BY JUDGMENTS OF OTHER COURTS. See *supra*, 1, d; *County Courts; Service; Service by Publication*.
 erroneous judgments are binding, if the court had jurisdiction. Courts, §§ 449, 452, 470-71, 475.
 federal courts cannot take jurisdiction of an action to set aside a judgment of a state court for irregularity or mistake. Courts, §§ 456, 486-88.
 otherwise as to vacating judgment for fraud. Courts, §§ 486, 562-63.
 a court may determine its own jurisdiction, and such decision is collaterally final. Courts, §§ 461, 498, 501-507.
 judgments of inferior courts binding till reversed. Courts, §§ 462, 508, 509.
 foreign discharge in bankruptcy not a bar. Courts, §§ 520-21.
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 judgments of one court, general or special, not reviewed in another. Courts, §§ 529-35.
 and are binding collaterally, or in all other courts. Courts, §§ 532-52.
 state decision on question of jurisdiction is *res judicata* in federal court between the same parties. Courts, § 620.
6. AFFECTED BY STATE LAWS, REMEDIES AND PRACTICE. See *Probate Courts*.
 a. Generally; privileges granted to local courts; holidays, comity; oil tax. Courts, §§ 76, 77, 79.
 the jurisdiction of the federal courts cannot be impaired by state laws. Courts, §§ 574, 586, 589, 593-95.
 federal equity jurisdiction derived wholly from the constitution and laws, unaffected by state statutes. Courts, §§ 580, 611-12.
 state decision on question of jurisdiction is *res judicata*. Courts, § 625.
 state laws, practice and procedure — followed at law. Courts, § 87.
 federal courts governed by local practice, but derive their powers from the federal constitution and laws. Courts, §§ 575, 596-99, 618.
 otherwise in equity; general equity principles control. Courts, §§ 578, 608, 609.
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 as to service on agent of foreign corporations, apply, when. Courts, § 1355.
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 state statutes or land titles. Courts, §§ 2336, 2338.
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 lost records restored only under acts of congress. Courts, § 119.
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 penal provisions not enforced by federal court. Courts, § 618.
- b. What rights enforced in federal courts; creating special state jurisdictions over trusts, etc., does not affect federal. Courts, § 183.
 liabilities under common law or statute of a particular state; as, actions for death by negligence. Courts, §§ 568-69, 581-88, 1017.
 even though the statute provides that the action shall be brought in the state court. Courts, § 586.
 action on a bill of exchange in state court, consolidated with insolvency proceedings therein, does not prevent subsequent suit in federal court. Courts, §§ 570, 589-91.
 actions against towns for injuries on highways. Courts, §§ 571, 592.
 partition, a remedy created by state statute and confined to state courts. Courts, §§ 574, 594-95.
 equitable right of creditor in Michigan to subject property to payment of debt. Courts, §§ 577, 602.
 actions against counties, though state statutes exempt them. Courts, §§ 613-15.

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- what rights enforced in federal courts; creditors' rights, notwithstanding state insolvent laws. Courts, § 616.
- foreclosure of mortgages. Courts, § 624.
- restraining building of bridge over public river, authorized by a state. Courts, § 626.
- maritime contract under New York law. Courts, § 1752.
- equity proceeding to cancel a deed. Courts, § 2335.

7. EXTENT OF, WHEN ONCE ATTACHED; AUXILIARY PROCEEDINGS. See *Citizenship*, 1, a.

- a. Bill of revivor by administrator, without regard to citizenship. Courts, §§ 628, 634-35, 651, 676-77.
 - so of a creditors' bill in aid of execution, being a continuation of the original suit. Courts, §§ 629, 636-37.
 - when the proceedings affect third persons, they may be brought in irrespective of citizenship. Courts, §§ 630, 638-42, 675.
 - second suit by strangers to first, when they cannot otherwise be heard. Courts, §§ 640, 675.
 - bill filed during suit to dissolve partnership, bringing in new party, charging him with collusion and seeking specific performance, is an original bill; no jurisdiction. Courts, §§ 632, 643-47.
 - none, of a creditors' bill to aid a decree of the district court, unless citizenship so authorizes. Courts, §§ 633, 648-50.
 - when citizenship proper, proceedings ancillary to those in other courts entertained; creditors' bill in aid of judgment. Courts, § 661.
- b. Auxiliary proceedings; brought without regard to citizenship; bills to regulate judgments at law. Courts, § 260. See §§ 1000, 1144.
 - see *supra*; cross-bill filed regardless of citizenship. Courts, § 652.
 - injunction against judgment at law not original, unless other parties and different interests involved. Courts, §§ 653-56.
 - so of bill to set aside judgment for fraud, unless filed by a stranger. Courts, §§ 657-58.
 - or impeach a decree for fraud. Courts, § 1002.
 - so of bill to enjoin suit at law; suit to enforce judgment. Courts, §§ 660-61.
 - so of cross-bill. Courts, § 1001.
 - so of *mandamus* in aid of judgment, to compel tax levy to pay bonds. Courts, §§ 662-64.
 - so of suits ancillary to foreclosure. Courts, §§ 665-66.
 - so of *scire facias* to revive judgment. Courts, § 1003.
 - so of suit by surety against surety for contribution. Courts, § 667.
 - otherwise of bill seeking subrogation to security of sureties. Courts, § 668.
 - bill for injunction against garnishment is ancillary. Courts, § 669.
 - so of proceeding against surety on forthcoming bond in Louisiana. Courts, § 671.
 - so of proceeding ancillary to suit for infringement of patent. Courts, § 672.
 - so of suit against marshal, on his bond, when. Courts, § 673.
 - suit for foreclosure held not to be auxiliary. Courts, § 670.
 - proceedings ancillary to admiralty suit are auxiliary. Courts, § 674.
 - garnishment in Arkansas not auxiliary, but a civil suit. Courts, § 1009.
 - suit on *supersedeas* bond is in one sense incidental. Courts, § 1518.
 - no jurisdiction of, when no original jurisdiction. Courts, § 1602.
 - of district court, in bankruptcy, by bill in equity to settle title to fund. Courts, § 1763.

8. IN SUITS AGAINST SOVEREIGN POWER.

- lien against property of a state, when enforced, when not. Courts, § 193.
- the United States cannot be sued without its consent. Courts, §§ 678, 685, 688.
 - but its officers and agents may be, and its rights thus examined and decided. Courts, §§ 679, 686.
 - set-off allowed against the. Courts, § 716; but see § 717.
 - no money decree against, or account against its agent; cases reviewed. Courts, §§ 683, 698-700.
 - no costs against. Courts, §§ 717-18.
 - nor injunction. Courts, § 718.
 - but the war department may be enjoined from violating the constitution. Courts, § 719.
- if a suit to which a state is a party is removed to a federal court it must be remanded though docketed. Courts, §§ 680, 689-91.
- the record determines whether a state is a party. Courts, § 690.
- the fact that a state is a bank or other corporator does not prevent the bank being sued. Courts, §§ 681, 692-93, 797, 1346.
- the circuit court may enjoin a state board from diverting a fund set apart to pay bonds, after repudiation of the debt by the state and its transfer to state expense fund. Courts, §§ 682, 694-97.
- a state might be sued in the supreme court; how, when state interested not as a sovereign. Courts, §§ 701, 702, 720, 734-45.
- suit in admiralty against a state not maintained. Courts, § 703.

JURISDICTION, IN SUITS AGAINST SOVEREIGN POWER — continued.

circuit court cannot entertain a suit between a state and one of its citizens. Courts, § 704.

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9. PRACTICE AS TO; OBJECTIONS, HOW MADE. See *Pleading*.

objections to, how made; pleas, demurrer, motion for new trial. Courts, §§ 127-130.

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when citizenship properly averred, taken only by plea in abatement. Courts, §§ 168, 170-72, 177, 307.

one defendant cannot object that another defendant is a citizen of same state as the plaintiff. Courts, § 929.

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JURISDICTION OF THE CIRCUIT COURT.

as to jurisdiction in general, see *Divorce; Jurisdiction; Mandamus*.

as depending on the character of the parties, see *Aliens; Assignees and Indorsees; Citizens; Corporations; National Banks; Officers*.

as to subject-matter, see 2, *infra*; *Amount; Attachment; Copyrights; Divorce; Internal Revenue; Judicial Power; Jurisdiction, 2, a; Liens; Locality; Offices; Patents and Copyrights; Receivers*.

as to jurisdiction of the person, see *Attachment; Jurisdiction, 2, a; Process; Service; Service by Publication; Subpœna; Voluntary Appearance*.

how acquired, see *Citizenship; Jurisdiction, 2*.

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how lost, see *Jurisdiction, 3*.

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what judgment may be rendered, see *Judgments*.

1. IN GENERAL.

2. CONSTITUTION AND LAWS OF THE UNITED STATES.

1. IN GENERAL. See *Citizenship; Judicial Power*.

a. Generally; to prevent non-resident from proceeding against resident in federal court. Courts, § 438.

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none in cases of penalty or forfeiture. Courts, §§ 1720, 1724.

b. Land claims under grants of different states; case held within the provision. Courts, § 200.

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c. When the United States is plaintiff; *assumpsit*; creditors' bill; condemnation by secretary of treasury, or for custom-house. Courts, §§ 790-93.

d. Matters affecting consuls; consul a partner, no jurisdiction; *ne exeat* against consul; protected against state courts only. Courts, §§ 798-801.

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JURISDICTION OF THE CIRCUIT COURT, IN GENERAL—continued.

- e. *Mandamus* issued only as auxiliary to exercise of jurisdiction; in aid of judgment on municipal bonds of counties, to levy taxes; will run to United States marshal, when. Courts, §§ 802-806.
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 - f. None of non-resident defendants, though process served on them; appearance gives jurisdiction; action against non-resident director of resident corporation sustained. Courts, §§ 808-12.
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 - g. Miscellaneous—seizure under revenue laws, and distribution of proceeds of sale of the property. Courts, § 1825.
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2. CONSTITUTION AND LAWS OF THE UNITED STATES. See *Internal Revenue; Jurisdiction; Patents*.
- a. *Generally*; decree of district court not a matter arising under. Courts, § 650.
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 - b. Federal questions; what are, see *supra*, and *post*.
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 - c. Questions under laws of the United States, see *supra*, b.
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JURISDICTION OF THE DISTRICT COURT. See *Fugitive Slave Law; Jurisdiction*, 4, d; *Jurisdiction of the Circuit Court; Officers*.

- a. *Generally*; effect of act granting circuit court powers to district court; no writ of error from supreme court. Courts, §§ 1719, 1723, 1755.
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- a. Generally; when judgment of court of general jurisdiction pleaded, jurisdiction presumed. Courts, § 537.
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- b. As to averments of jurisdiction, see *Citizenship*, 3.
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- c. Pleas in abatement to the jurisdiction; effect of failure to take. Courts, § 59. See *Aliens*; *Corporations*, b.
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- d. Pleas in bar; to the jurisdiction are, when. Courts, § 128.
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- a. Generally; of process out of jurisdiction, void. Courts, §§ 124, 125.
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 - may be in either district where defendant a citizen. Courts, § 1197.
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 - not so found when fraudulently induced to come into the district, or detained improperly, or while temporarily visiting there. Courts, §§ 1611-12, 1628-29.
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- b. Substituted on member of family, facts must fully appear; no presumption of regularity. Courts, § 166.
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1. IN GENERAL.

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Myer, William G.

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